INDIAN WATER RIGHTS IN THE CONCLUDING YEARS OF THE TWENTIETH CENTURY

NUMBER 5

by

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I. INDIAN RIGHTS TO THE USE OF WATER - THEIR PRICELESS RESOURCE

American Indian Winters rights in the arid and semi-arid west are priceless assets. It is not an exaggeration to state that those rights are an imperative necessity for the survival of Indian people as distinct and independent nations and tribes. Without water in the dry and frequently hostile environment in which the vast preponderance of Indian people reside, the lands of the reservations are virtually useless. Stripped of their Winters rights, the Indian lands would remain untilled, the minerals would remain in place and the permanent homes and abiding places, which the Indians have been solemnly assured by the National Government, would become uninhabitable.

Speaking for the United States Supreme Court, Justice Holmes once stated that "[a] river is more than an amenity, it is a treasure."[1] Had Justice Holmes been considering Indian water rights, he would have stated that a river is more than an amenity, it is the essence of Indian life. Judicial cognizance has now been taken of that fact.

It is important to emphasize that Winters rights have become emblematic of the character, nature, quality and dignity of the Indian nations and tribes. Western Indians have become increasingly identified with their invaluable resource. Today, the American Indians are in a struggle to retain their sovereignty, their Winters rights and, very markedly, their reservations. It is to that struggle in the closing years of the twentieth century that this article is addressed.

A. The Struggle To Maintain Indian Winters Rights

The history of the western United States is replete with innumerable violations of Indian water rights by federal agencies, the states and non-Indians. One of the most perplexing aspects of that history is the virtual total disregard of those invasions of Indian water rights by the National Government which occupies the status of a trustee. Today, however, the ever-increasing, sharp competition between Indians and non-Indians for a very limited supply of water is forcing the National Government to review its past policies and practices and, moreover, to make elections that are now forced upon it. That competition for water has greatly increased within the last several months for a variety of reasons. Drought and the energy crisis have accentuated the struggle on the part of the Indians to preserve those essential rights. Among the problems confronting the Indian people is the vast federal subsidization of large populations in the arid southwestern United States. Those large and politically powerful urban centers constitute a present primary cause of great concern for the Indians. The people occupying those centers of population have been and are now being systematically packed into Southern California, Colorado and Arizona by the policies of the National Government which gave rise to large subsidized projects for the benefit of those metropolitan areas. Those areas are demanding adequate supplies of water and the politically-oriented Department of the Interior is diligently seeking to oblige those political demands. Thus confronted, the American Indians on the vast Colorado River and elsewhere throughout the western United States are the first victims of the contradictory policies adhered to by the Federal Government with regard to water resources. The Indians hold title to the last substantial block of water which is undeveloped in the Colorado River Basin and, indeed, throughout the western United States as a whole. The issue is whether the United States of America will accede to the political demands of the metropolitan areas or will effectively perform its functions as a trustee for the American Indians. A formidable body of law, predicated upon the soundest principles, should protect the Indians and their rights to use and develop their water resources. Yet, since the pronouncement in 1908 of the Winters Doctrine, and its further development by the Supreme Court, that doctrine has been under steady

attack or intentionally circumvented primarily by non-Indian agencies within the Department of the Interior.

This article will review the present conflicts in detail, including the National Water Resources Management Policy which is currently being formulated.

B. The Winters Doctrine - A Necessity For Indian Survival

On repeated occasions, the fundamental concepts of the Winters Doctrine have been reviewed.[2] Basically, the Court in Winters, declared that water rights are interests in real property of the highest dignity.[3] In Winters, the Supreme Court was applying concepts relative to the conveyance of real property among sovereigns. Involved in the dispute were the Fort Belknap Indians in what at that time was the territory of Montana. The Fort Belknap Indians, along with other tribes, had entered into a treaty between the Blackfoot Tribes and the United States in 1855. Among the tribes involved was the Blackfoot Nation, consisting of the Piegan, Blood, Blackfoot and Gros Ventre Tribes which were the east of the Rocky Mountains.[4] Also involved in Winters was the Agreement of May 1, 1888.[5] Both the 1855 Treaty and the 1888 Agreement used language of grant. In effect, the Indians were ceding to the National Government a large area of land while at the same time retaining a more restricted area which constituted the Fort Belknap Indian Reservation. Water, although essential to inhabiting the reservation, was not mentioned in either the 1855 Treaty or the 1888 Agreement. Nevertheless, adhering to the sound precepts of conveyancing, the objectives of both the 1855 Treaty and the 1888 Agreement being to provide the Indians in question with a permanent home and abiding place, the Supreme Court declared that the tribes had retained the use of water in the Milk River, title to which resided in the tribes to the center of the Milk River.[6]

Aiding the Court in its interpretation of the 1855 Treaty and the 1888 Agreement was a fact of which the Court took explicit judicial cognizance -- water was a necessity for the reservation if the reservation were to remain habitable.[7]

Recognizing the primacy of federal law over the Indians and that the very future of the Indians would turn on an adequate supply of water, the Court rejected the contention advanced by Winters that the 1889 admission

of Montana into the Union abrogated the title of the Indians to the requisite rights to the use of water, title to which, the Court held, had been retained by them in the 1855 Treaty and the 1888 Agreement.[8] On the subject of the retention by the Indians of their water rights and, indeed, all other properties they did not convey to the United States, the Court stated:

> "...[I]t would be extreme to believe that within a year [after the 1888 Agreement, when Montana entered the Union] Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste - took from them the means of continuing their old habits, yet did not leave them the power to change to new ones?"[9]
> [Emphasis supplied]

It is emphasized that the Supreme Court took judicial cognizance of the fact that to divest the Fort Belknap Indians of their title to the rights to the use of water would have "destroyed the reservation."[10] It is, of course, a truism that, in the arid and semi-arid west where most Indian reservations are located, water is a critical catalyst for all economic development. The language from Winters projecting the continuity of life by the Indians of the Fort Belknap Reservation presaged the decision in Conrad Investment Co. v. United States[11] rendered by the Court of Appeals for the Ninth Circuit the same year as Winters. Conrad is important because it again involved the Blackfoot Treaty of 1855 and the Agreement of May 1, 1888, as did Winters: the difference being that the Blackfoot Indian Reservation was involved in Conrad but not in Winters. In Conrad, the court of appeals, relying heavily upon Winters, declared that the rights to the use of water could not be determined with great accuracy.[12] Nevertheless, it was a policy of the National Government to provide whatever water was necessary for the future development of the reservation. Hence, the Court of Appeals for the Ninth Circuit declared that the quantity of water requisite to meet the present and future development of the Blackfoot Indian Reservation would be the criterion adhered to in Conrad to measure the Indian water rights.

Recently, in assessing those future requirements, the Supreme Court adopted the same method to measure water rights based upon irrigable acreage:

> "Arizona...contends that the quantity of water reserved should be measured by the Indians' 'reasonably foreseeable needs,' which, in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.[13] [Emphasis supplied]

That criterion (irrigable acreage with reasonable water requirements) has been used to measure the Indian rights in the streams in which the issue was presented in the form of claims for agricultural purposes.[14] Indeed, the court, in United States v. Ahtanum Irrigation District,[15] declared that Winters rights could be exercised for beneficial purposes within the reservation, although the decree measured Indian rights by the water requirements for irrigable acreage.[16]

C. The Winters Doctrine Involves A Great Deal More Than Indian Rights To The Use of Water

By declaring the Winters Doctrine, the Supreme Court practicably applied an historic concept:

> "It must always be remembered that the various Indian Tribes were once independent and sovereign nations, and that their claim to sovereignty long ~~predates~~ predates that of our own Government."[17]

The sovereignty of the Indian nations is of importance in assessing not only the Winters Doctrine, but their future. In Winters, the Fort Belknap Indians, to use the words of Chief Justice Marshall in Worcester v. Georgia,[18] were viewed as sovereigns:

> "[The Indians are] a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."

Important in regard to Winters is an additional statement from Worcester:

> "This treaty, thus explicitly recognizing the national character of the Cherokees, and their

> right of self-government; thus guarantying their lands; assuming the duty of protection and of course [pledging] the faith of the United States for that protection [against the trenching upon the Cherokee Nation by the State of Georgia or anyone else.]...."[19]

Finally, Worcester enunciated and Winters recognized that an Indian tribe is:

> "a distinct community occupying its own territory, with boundaries accurately described, in which the laws of [the state] can have no force.... The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States."[20]

In explicit terms, those concepts were applied by the Court of Appeals for the Ninth Circuit when it rendered the Winters opinion which was affirmed and applied by the Supreme Court of the United States.[21] There the Court of Appeals recognized that the Blackfoot Treaty was the supreme law of the land and as such it transcended state law.[22] It must be recognized from the rationale of Winters that the Supreme Court viewed the title of the Blackfoot Indians as predicated upon their claims to their ancient homelands. Those claims dated from time immemorial, long prior to the inception of the United States of America as a state independent from the Crown. Thus it was that the Fort Belknap Indians, in the status of title holders to the water rights, were claiming title; their lands were established independent of any federal right. The Indians retained their title to those properties that they did not convey to the United States by the 1855 Treaty and the 1888 Agreement.

In taking cognizance that the Fort Belknap Indians occupied the status of title holder and granter to the United States, the Court of Appeals and the Supreme Court were applying the concepts of United States v. Winans.[23] In Winans, the Supreme Court declared that the Yakima Indian Nation, when entering a treaty with the United States, was the holder of titles to the land involved. In other words,

> "...the treaty was not a grant of rights to the Indians, but a grant of rights from them [to the United States and the treaty was, for the Indians] a reservation of those not granted."[24]

Those concepts have been repeatedly recognized and repeatedly applied to sustain the proposition that the Indian nations and tribes (1) are now and have always been from time immemorial sovereigns in their own right, (2) have inherent power of independent status with authority to govern themselves, (3) are invested with the power of entering into treaties and agreements which constitute the supreme law of the land, and (4) having title, the Indians "had command of the lands and the waters -- command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization."[25] That the Indians could and did reserve the title to their water rights in the Milk River when they conveyed to the United States the remainder of their once vast ancient homeland is established beyond controversy.[26] Winters refutes all assertions that Indian rights are "federal rights."

D. Executive Order Reservations And Treaty Reservations

Because the Winters Doctrine was first enunciated in regard to reservation established by treaty, it has been an unfortunate belief in some areas that the doctrine and the rights to which it pertains are not applicable to reservations established by executive order. Those same critics likewise declare that Winters rights to executive order reservations are of lesser dignity than treaty rights. That is untrue. When a reservation is created by executive order and Congress has recognized the title residing in the Indian nations and tribes occupying the reservation, that title has been held to be of equal dignity and status with treaty reservations.[27] In Gibson v. Anderson, the court stated:

> "There can be no doubt that such a reservation by proclamation of the executive stands upon the same plane as a reservation made by a treaty or by act of Congress."[28]

While the Gibson case arose in connection with minerals, the same concepts have been applied to Winters rights.[29] Short shrift was given by the Supreme Court to the contention in Arizona v. California that Winters rights were not part and parcel of executive and congressionally-created Indian reservation on the Lower Colorado River.[30] Irrespective of the abundance of authority supporting the conclusion that the Winters rights are predicated upon the soundest concepts of conveyancing of interests in

real property,[31] attacks upon that doctrine have continued since its inception and are now proceeding at an accelerated pace.

E. Continuing Assaults Upon The Concepts of The Winters Doctrine

Chancellor Kent, in his famous commentaries, referred to the violation of Indian treaty rights in the Northwest Territory: The non-Indian population surrounding Indian lands was "penetrated with perfect contempt of Indian rights."[32] Kent could have been speaking of the Secretary of the Interior from the moment of the passage of the Reclamation Act of 1902.[33] Further, since the enunciation of the Winters Doctrine, the personnel of the Department of Interior, acting in concert with the Department of Justice, have been endeavoring, many times with success, to abridge, denigrate and violate Indian Winters rights.[34]

Violations of Indian rights by the practices and policies of the Interior Department through the last three-quarters of this century have been quite succinctly summarized in United States v. Ahtanum Irrigation District.[35] Even when Winters was before the lower courts, the Secretary of the Interior and the personnel immediately under his direction were actively and repeatedly violating Indian treaty rights.[36] The following are prime examples of the violations which transpired on the Yakima Indian Reservation:

1. The Secretary of the Interior attempted to limit the water rights of the Yakima Indian Nation in the Yakima River for the benefit of the Yakima River Federal Reclamation Project. So blatant was that violation that Congress took action to correct, at least to some degree, the Secretary's violation of those Winters rights.

2. The Secretary of the Interior, with the knowledge that the Winters Doctrine had been enunciated, attempted to give seventy-five per cent of the Yakimas' rights in the Ahtanum Creek to non-Indian water users north of that stream.[37]

That attempt to confiscate the Indian water rights for the benefit of the non-Indian involved the execution of a specific agreement by the Secretary purporting to grant those rights to the non-Indians.[38]

The Secretary of the Interior, at the same time that he was violating the Yakima Indian water rights, was perpetrating the same violation of Indian water rights upon the Fort McDowell and Salt River Indians in the State of Arizona for the benefit of the Salt River Reclamation Project.[39] Those Arizona tribes are now vainly seeking to obtain the water of which they were deprived when the Secretary of the Interior and the Attorney General failed to assert on the tribes' behalf their Winters rights against the Salt River Federal Reclamation Project.[40] Senator Kennedy has legislation now pending before Congress to obtain a supply of water for those two Arizona tribes, so grievously and continuously damaged by the action of the Secretary of the Interior.[41]

It is clear that there is now and has been for many years a federal policy of seizing Indian Winters rights for the benefit of non-Indian projects and purposes. It will be against this background that the newly proposed policies and practices of the Carter Administration will be formulated. This analysis necessarily proceeds upon the basis that no fundamental changes have been made in the historic practices of either the Interior or Justice Departments.

II. TOWARD A NATIONAL WATER RESOURCES MANAGEMENT POLICY

The "high standards for fair dealing required of the United States in controlling Indian affairs[42] are now being tested against the pragmatism of politics in the energy crisis. It will shortly be known whether the stated desire to protect the Indian rights is simply another of the many "demonstrations of a gross national hypocrisy."[43] or whether the promises recently made to the Indian people are sincere. During the campaign, President Carter made the following policy pronouncement about the Indian people:

> "I recognize the unique relationship between the federal government and the Native Americans.... Indian people should be able to make their own decisions regarding...the best use of their land, water, and mineral resources, and the direction of their economic development.... I intend a complete review of all federal programs designed for Indian people.... This review will determine the best manner by which the trust responsibility should be assured and maintained; it will consider

> how Indian legal interests, including land, water, and energy resources, can best be represented in the future.... We must obey and implement our treaty obligations to the American Indians."[44]

There is no challenge to the good faith of the President in his quoted statements or of his good intentions toward the Indian people. Reality must not, however, be overlooked in regard to the intransigent federal bureaucracies which have long violated Indian rights, and the inability of the Presidents to pierce through those bureaucracies. The bureaucracies have previously blunted the sharpest and most sincere desires of various administrations to act on behalf of Indian people. There is some evidence that the federal bureaucracy, for the moment at least, retreated from its high-handed approach to Indian water rights in the formulation of the National Water Resources Management Policy. Whether the Indian tribes will be able to survive the new national policy is open to question. The events preceding the development of that policy can at this time only be assessed as being inauspicious from the standpoint of the Indians.

A. "Water Policies For The Future"

On July 14, 1973, the National Water Commission delivered its "Final Report to the President and to the Congress of the United States."[45] In detail, the National Water Commission reviewed its objectives and conclusions. Because the National Water Commission prepared its report at a time when the present national water crisis was developing, it presaged the grave and on-going threat to the Indians and their future. Omitted from the report (and quite understandably) were the sharp criticisms that the National Water Commission drew from its effort to categorize the Indian Winters rights as being federal rights. The concepts expressed in the Commission's report are markedly influencing the Water Resources Council which has the obligation to develop the National Water Resources Management Policy. In turn, it must be observed that the Water Resources Council has been greatly influenced and its personnel largely controlled by the concepts of the Bureau of Reclamation and its western constituency, which have long been responsible for, and party to, the attempts to denigrate and violate the Indian Winters rights.

On November 10, 1972, the National Water Commission released a proposed report.[46] Contained in chapter 13, "Federal-State Jurisdiction in

the Law of Waters," was a summation of what the National Water Commission perceived the law to be respecting Indian rights to the use of water.[47] The Commission was in grave error in that it attempted to categorize Indian Winters rights with "federal rights." That was its inceptive error in regard to the subject. The Policy Commission formed by the Water Resources Council committed the same grave error and was forced to retract its position in July, 1977.[48] Indeed, that Water Policy Committee, which is directing the formulation of the "National Water Resources Management Policy" for the Carter Administration, used not only the same legal citations, but much of the erroneous language of the National Water Commission.[49] That, of course, is not surprising because of the close relationship between the latter, now defunct National Water Commission, and the Water Resources Policy Commission.

Basically the National Water Commission's approach to the federal-state relationship was conceived in error. Fundamentally, it purported to categorize Indian rights with federal rights, which in itself is a most serious error. Moreover, the National Water Commission proceeded on the concept that in some manner the Federal Government would either submit to state law or would at least be governed by it. A principal target of the proposed report of the National Water Commission was the Winters Doctrine. The proposed report stated that:

> "[f]or many years the U.S. Bureau of Reclamation developed its irrigation projects on the basis of water rights obtained in compliance with state law."[50]

That statement was in error. In Arizona v. California,[51] Justice Brandeis pointed out with emphasis that the National Government could proceed in complete disregard of Arizona state laws respecting the appropriation of rights to the use of water.[52] In Ivanhoe Irrigation District v. McCracken that concept was reiterated and reaffirmed.[53]

Having made its initial error, the National Water Commission in the proposed report continued:

> "In 1908, however, a very different concept of water rights was introduced by the U.S. Supreme Court's decision in Winters v. United States."[54]

Relative to the Winters Doctrine, the National Water Commission stated that:

> "The Court held that by virtue of Federal law, Indian water rights exist which are independent of and, as it turns out, inconsistent with state water rights."[55]

Because the Federal Government is immune from suit "these rights could be adjudicated only with the consent of the United States, in its uncontrolled discretion."[56] It was also erroneously stated in the proposed report that:

> "[i]n 1963, in Arizona v. California this uncertainty was extended further -- the Court held that water was reserved for a variety of other Federal activities when public land was withdrawn for such purposes as national forests, parks, monuments, and wildlife refuges."[57]

Additionally, the report alluded to the Federal Power Commission v. Oregon,[58] known as the Pelton decision, in which the Supreme Court held that the United States could license a private power dam on a nonnavigable river but on reserved federal land.[59] The proposed report added that "[T]he Supreme Court held the license could be issued to build the dam despite the fact that its construction violated state law."[60] In simplest terms, the National Water Commission disregarded the supremacy clause[61] of the Constitution relative to the development of both federally-constructed and federally-operated projects.

As stated, the National Water Commission proceeded in error to categorize Indian rights as "federal rights." It was highly critical of the fact that for many years funds were not made available to the Indians, thus preventing the Indians from fully exercising their entitlements in western streams. Alternative methods were proposed to eliminate this conflict between Indian and non-Indian rights. A course recommended by the proposed report of the National Water Commission:

> "Federal compensation for water users having vested rights under state law when those rights are impaired by valid Indian uses initiated after the state water right vested. For those who made investments and are presently making use of water subject to Indian claim, compensation can be

justified on the grounds of fairness."[62]

An example cited by the National Water Commission was the Central Arizona Project, which was authorized when "Indian reservations held decrees for almost one million acre-feet of water, about one-seventh of the mainstream supply."[63] What the Commission did not say, but should have, is that the Central Arizona Project should never had been authorized because there was no water for it. Once again, a water policy is being developed for and on behalf of non-Indian projects and purposes. The policy has been developed by the National Water Commission with the manifest objective of denigrating the Winters rights and, in effect, vesting in the states a veto power over national developments which are imperatively necessary for the United States of America as a whole. Quite obviously, the National Water Commission was controlled, and its policy formulated, by the land and water speculators who have been raiding the national treasury utilizing Interior's Bureau of Reclamation as a conduit for huge subsidization such as the on-going Central Arizona Project. The rationale of the Commission is that it "believes it is unfair to deprive users of their water supply without compensation when Congress has repeatedly made Federal investments in projects whose supply was subject to unused Indian rights."[64]

There was immediate response to the proposed report of the National Water Commission. The desire of the Indian people to be heard in that regard was totally unsatisfied. A letter addressed to the Chairman of the National Water Commission, Charles F. Luce, pointed out that the Commission was proceeding in grave error in regard to Indian rights to the use of water.[65] Response to that letter by Charles F. Luce, now Chairman of Consolidated Edison in New York, was that further review would not be permitted in regard to Indian water rights.[66] This valid request made on behalf of the Indian people was brushed aside.[67]

It is important to observe that the National Water Commission did, in fact, separately present federal rights and Indian water rights in its final report.[68] Irrespective of the National Water Commission's separation of Indian rights to the use of water from federal rights, the final report continued in error with regard to the nature and genesis of Indian rights. An excerpt taken from the final report of the Commission is demonstrative of the basic error of that report on the subject:

> "An Indian water right arises under Federal law. In nearly all cases it comes into being when a Reservation is created, whether the act of creation is a treaty, an act of Congress, or an executive order, and it pertains to lands within the Reservation."[69]

This statement departs radically from the principles and legal concepts upon which the Winters Doctrine is predicated. It ignores the fact that Indian water rights are real property interests of the highest dignity. Likewise ignored is the fact that those interests in real property were either retained by the Indian people when they entered into their treaties with the National Government or were vested in the Indians by the National Government when it created an Indian reservation, either by an act of Congress or by an executive order. Under neither circumstance can it be correctly asserted that the Indian rights were created nor is it proper or correct to refer to the Indian rights as having come "into being" when the reservations were created.[70]

Nevertheless, although the National Water Commission ceased to function in 1973, the tone and temper of its final report is strongly reflected in the policies now being formulated by the Water Resources Commission. The final report of the National Water Commission foreshadowed the inceptive acts and the formulation of the new National Water Resources Management Policy especially in the area of Indian water rights and the conflicts relative to them.

B. The Policy Committee To Formulate The National Water Resources Management Policy

The President has expressed an intent to formulate a National Water Management Policy.[71] To effectuate the President's plan for that policy, Secretary of the Interior Cecil D. Andrus, as Chairman of the Water Resources Council, was directed to lead a study which would develop a "comprehensive reform of water resources policy, with water conservation as its cornerstone."[72] Acting at the President's direction, the Secretary of the Interior, at the National Conference on Water held May 24, 1977, announced a nine-point program which would be directed "toward a comprehensive and realistic national water policy."[73] Point six of the Secretary's program categorized as a single unit "quantification of Indian

water rights and federal water rights."[74] The issue of whether Indian rights are federal rights is a controversy that will continue until the current administration officially rejects the concept that Indian rights are federal rights and denies that they can be categorized as federal rights.

Moreover, the Department of Justice also continues the policy of categorizing Indian rights as federal rights. That course of conduct is being adhered to in several cases being litigated in the western United States. The Department of Justice has been challenged in regard to its error and the outcome of the confrontation between the Indian leaders and the Department of Justice remains to be resolved.

To perform the task outlined by the Secretary of the Interior, a Policy Committee was established within the Department of the Interior.[75] The Assistant Secretary for Land and Water Resources, within the Interior Department, has been designated chairman of the Policy Committee. The implications of that appointment are of overriding importance. It turns largely upon the conflict of interest which exists within the Interior Department between the newly created Assistant Secretary for Indian Affairs and the Assistant Secretary for Land and Water Resources. Their interests are antipodal with respect to Indian rights and the ensuing confrontation is evidence of more difficulties in the future.[76]

As chairman of the Policy Committee, the Assistant Secretary for Land and Water Resources has under his aegis the Bureau of Reclamation, the Bureau of Land Management and other non-Indian agencies. These Interior Department agencies have consistently violated Indian water rights for the benefit of non-Indian purposes and projects.[77]

Accentuating the threat to the Indians was the appointment of a former Bureau of Reclamation employee to be the "Team Leader" of the task force to analyze and report on "Indian Water Rights and Federal Reserved Water Rights."[78] There is no Indian representation on the task force. Although the Bureau of Indian Affairs had representation on the task force, in the ultimate formulation of policy, the Assistant Secretary for Land and Water Resources and those under his direction simply disregarded the Bureau of Indian Affairs personnel assigned to "represent the Indians."[79]

The first definitive step in the process of formulating the "legal concepts" upon which the national water policy was to proceed was the

preparation of a draft of a bill prepared for the task force. That proposed bill was entitled "Federal Reserved Water Rights Definition and Development Act of 1977."[80] The proposed draft of the act and "Explanatory Statement" was presented to the Assistant Secretary for Land and Water Resources on June 22, 1977.[81] Although the bill was never adopted, it articulates all of the attacks previously made by the Bureau of Reclamation and other opponents of the Indians on their Winters rights. However, it is more than coincidental that the Water Resources Council would devote so much time and so much effort to the preparation of the bill. That articulation is a clear manifestation that the Water Resources Council is continuing on its broad policy of denigrating Indian Winters rights.[82]

The primary objective of the proposed bill and "Explanatory Statement" was to coalesce and to present federal right for national parks, forests and fish and wildlife projects as identical to the Indian Winters rights to the use of water.[83] By that error, the Policy Committee simply mirrored the error contained in the final report of the National Water Commission. Like the National Water Commission, it was forced to retract that error.[84] However, the implications of the Policy Committee's error warrant review because of the conflicts to which it gave rise. In addition to attempting to encompass Indian rights within the purview of federal rights, the Policy Committee proposed the following in its bill:

(i) to limit the Indians to the water uses of a hundred years ago in the light of the then extant technology;

(ii) to limit the Indian rights to the use of water to the number of Indians living on the reservation;

(iii) to deny the Indians the right to the use of impounded water or other modern methods of water regulation;

(iv) to utilize short economic criteria as to lands which could be designated as "practicably irrigable" and otherwise drastically to limit the Indian Winters rights to the use of water.[85]

It is worthy of note that the Supreme Court rejected limiting the measure of Indian water rights to the number of Indians living on the reservations:

> "How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."[86] [Emphasis supplied]

Moreover, the proposal would, if it were ever enacted, drastically limit the extent and uses for which Winters rights could be exercised. The magnitude of those intended limitations is contained in the definition of the term "federal rights" set forth in the proposed bill:

> "The water reserved for use of Federal and Indian reservations is hereby determined to be that portion of the unregulated natural flow of water courses appurtenant to the reservation which is available on a priority date concurrent with the date when the reservation was established and which can be feasibly used to accomplish the reservation purposes, as originally envisioned when established."[87]

The entire thrust of the "Explanatory Statement" of the proposed "Federal Reserved Water Rights Definition and Development Act of 1977" is that (a) Indian rights are federal rights and (b) they can be diminished or obliterated by the will of the National Government. As a consequence, the task force on "Indian Water Rights and Federal Reserved Water Rights" was proceeding upon the predicate just mentioned. Moreover, that course was being adopted without the knowledge, consent or acquiescence of the Indian people. Hence, the consequences that flowed from the conduct of the National Water Resources Council and particularly the committee for the formulation of the policy were not surprising: Ultimately, the task force abandoned the "Federal Reserved Water Rights Act of 1977"; however, the concepts continue to persist within the Policy Committee.

On July 5, 1977, the Policy Committee released a "Policy Option Paper on Indian Water Rights and Federal Reserved Water Rights." That "Policy Option Paper" had been scheduled to be published in the Federal Register on July 15, 1977, in accordance with the plans to proclaim the envisioned National Water Resources Policy.[88]

On July 6, 1977, the day following the release of the "Policy Option Paper," the Colville Business Council, the governing body of the Colville Confederated Tribes, met in full session to consider it.[89] Particular consideration was directed by the business council to the claim that the Indian Winters rights are "federal rights." The gravest concern of the Colville Business Council was the fact that the proposed policy was diametrically opposed to Colville Confederated Tribes v. Walton,[90] a case now pending in the United States District Court for the Eastern District of Washington.

Also pending before the same court is the case of United States v. Walton,[91] which follows the rationale of the Water Resources Council toward Indian rights, in direct conflict with the Colville case. In Colville, the Indians seek to quiet title to their water rights in a stream, No Name Creek, which rises entirely within the Colville Indian Reservation and flows its full length into a closed body of water known as Omak Lake. The Confederated Tribes also aver the irreparable damage that Walton has caused them for many years and the continuing irreparable damage that they are suffering by his use of water required by the Tribes.[92]

Although the Justice Department was requested to intervene on behalf of the Confederated Tribes against the Waltons, it refused to do so. Acting strictly on its own volition and in keeping with the rationale of the "Option Policy Paper," the Department of Justice asserted that it was representing the Secretary of the Interior who had the power and the authority to allocate water to non-Indian Walton.[93]

Adhering to the erroneous concepts advanced by the National Water Commission, the Justice Department referred the case of United States v. Walton to the United States Attorney in Spokane.[94] That case proceeds on the concept that federal water rights encompass Indian water rights. Simplistically, the Justice Department asserts in Walton the power of the Secretary of the Interior to allocate Indian Winters rights to non-Indian Walton.[95]

Very properly, the Colville Confederated Tribes, having initiated the case against Walton asserting violation of their rights, have viewed and continues to view the conduct of the Justice Department in the case of United States v. Walton as a clear-cut violation, not only of their title to water on the Colville Indian Reservation, but a violation as well of

their power and authority to administer those rights.[96] Hence, when the Water Resources Council announced a policy which declares that Indian rights are "federal rights" and that they are not distinguishable from the public rights for national forests and national parks, the acute attack upon the Indian rights and interests required response. Action by the Colville Confederated Tribes was immediate.

They rejected the contention issued in the "Policy Option Paper" that the Indian rights, including but not limited to the Colville rights, are federal rights. The present Chairman of the Business Council of the Colville Confederated Tribes was also the President of the National Congress of American Indians. That organization, the largest Indian organization in the country, immediately challenged the Chairman of the Policy Committee who issued the documents asserting that federal rights include Indian rights.[97] The National Congress of American Indians was joined in its challenge to the Assistant Secretary of the Interior by the National Tribal Chairman's Association, which adopted an identical course with the other Indian group.

There was a meeting on July 12, 1977, of Indian leaders with the Chairman of the Policy Committee of the Water Resources Council and members of his staff. The Chairman readily admitted that the Indian rights are not federal rights and that the Indian leadership had not been consulted. At the meeting, there was brought forth a most salient point: The Secretary of the Interior had designated and announced the appointment of the first Assistant Secretary of the Department of Interior for Indian Affairs. That designated official was placed in an impossible position by the conduct of the Water Resources Council. A most important Indian policy in regard to water rights had been announced, but the designated Assistant Secretary had no voice in the formulation of the policy and would, moreover, be bound by it if it were accepted as official in character.

The Assistant Secretary for Indian Affairs, designate, prepared a policy statement which was presented to the Secretary of the Interior with the request that it would be substituted for the gravely erroneous "Policy Option Paper."[98] The Secretary of the Interior agreed that Indian rights are not federal rights and directed that cognizance of that fact be published in the Federal Register. Accordingly, the criticized statement was revised and published. In that truncated version of the "Policy Option

Paper," the references to Indian rights were deleted. The offensive first sentence of that paper was revised to eliminate not only any references to the Indian water rights, but also references to the Supreme Court decisions which had been improperly used to support the concept that Indian rights were federal rights.[99]

The Secretary of the Interior was urged by the Assistant Secretary for Indian Affairs that the proposal, which he tendered to the Secretary, be published in the Federal Register. By proceeding in this manner, the publication would constitute an official Interior Department position in regard to the Water Resources Policy being formulated.[100]

Adhering to established practices and procedures, the Secretary referred to the proposed Indian position, set forth below, to the Secretary's lawyer, the Solicitor.[101] That official made drastic revisions in the proposal. Those revisions are of utmost importance not only to the Indian nations and tribes, but to the Nation as a whole. The Assistant Secretary for Indian Affairs, in explicit terms, declared:

> "Moreover, the Indians are the owners of the full equitable title to the rights to the use of water of either surface water and ground water on their reservations. The sole interest of the United States is the holder of the legal title to those rights for the benefit of the Indians."[102]

The Solicitor, in his own handwriting, revised the assertion of full equitable title for Indian affairs and substituted the following language:

> "Indians are the owners of a beneficial right to the use of either surface water and groundwater related to their reservations."[103] [Emphasis supplied]

The Solicitor also revised the statement of the Assistant Secretary for Indian Affairs as to the "sole interest" of the Federal Government:

> "The obligation of the United States as the holder of the legal title to those rights is to [sic] for the benefit of the Indians."[104]

There is no clear legal meaning to the terminology used in the Solicitor's statement that the "Indians are the owners of a beneficial right to the

use" of surface and groundwater "related" to their reservations.[105] Similarly, the meaning of the change from "sole interest" of the United States to "obligation" of the United States is unclear. However, it is manifest that the Solicitor attempted greatly to diminish the "full equitable title" of the Indians to their Winters rights to the use of water and also the national obligation to recognize those Winters rights.

Adding to the confused status of the Indian Winters rights, as viewed by the Interior Department and the Water Resources Council, is the publication "Water Resources Council, Water Resources Policy Study, Indian Water Rights Statement."[106] There, the Indians are denied the "full equitable title" to their Winters rights and are limited to "beneficial rights to the use" of water. However, what appears to be a legal nonsequitor is the statement that "[t]he trustee United States is obligated to protect Indian rights to the use of water."[107] It is also to be observed that the publication in the Federal Register concedes that Indian water rights are not the same as federal rights and are not included in the policy involving federal rights.

It is of extreme importance from the legal standpoint that the Federal Register has carried the publication of the Indian rights and interests under the heading of "Water Resources Council." As observed above, the Secretary of the Interior occupies the status of the principal agent of the United States Trustee. That same officer occupies the status of Chairman of the Water Resources Council. However, the alternate to the Chairman of the Water Resources Council signed the publication in the Federal Register.[108] Whether this simply evidences total confusion or a studied effort to subvert Indian rights to the control of the Water Resources Council is not clear at this time.

Obviously, the Secretary of the Interior, who is both trustee for the Indians and Chairman of the Water Resources Council, and the Solicitor's Office have undertaken to make arbitrary determinations relative to the Indian rights to the use of water. Those determinations must, of necessity, raise doubts in the minds of the Indians and those who represent them as to what the policy is going to be and who is going to determine that policy. As stated above, President Carter promised that the Indians would be able "to make their own decisions regarding...the best use of their land, water, and mineral resources...."[109] That promise is now being

tested to its very depth. It is too early to decide whether those campaign promises are but other "demonstrations of gross national hypocrisy."[110]

The personnel of the Policy Committee have failed totally to take cognizance of the actualities of the western water crisis. They are proceeding on the basis that rights to the use of water can be managed by the Washington bureaucracy. That is a most serious error. Basically, the Policy Committee is seeking not only to communalize the vested rights of the Indian people, but to manage the vested titles of numerous non-Indians whose interests in their rights partake of interest in real property. There has been and is now a failure of the federal bureaucracy to comprehend that a right to the use of water is a property interest of the highest dignity protected against seizure, manipulation or divestiture by the due process provision of the Constitution.[111]

C. Indian Rights To The Use of Water - The States - The National Water Resources Management Policies

The conflicts between the National Water Commission, the Policy Commission which is now formulating the new Water Resources Policy and the American Indians are sharpened at the state and local levels. There the clashes between Indians and non-Indians are brought to a much greater intensity than at the federal level in which compromises are more readily achieved. That area of compromise stems largely from Washington's impersonal approach, in general, to the distant and far from understood daily clashes that go on in areas of short water supply. To the informed, it seems that the personnel developing the Water Resources Management Policy are, in many instances, totally unschooled in the nature or intensity of the continuing struggles in the western United States over the ever-decreasing supply of water.

In Seattle, Washington, those factors were clearly delineated at the Annual Conference of Western Attorneys General held August 8-11, 1977. Indeed, the principal theme of that conference was "General Indian Jurisdictional Problems."[112] Other issues presented included "Energy and Land Use Questions," "Indian Taxation Issues" and "Water Rights in the West." Speakers, explaining the states' legal position on the subject, appeared at the conference and expressed their opinions. Because several of the highly controversial issues were thus presented, the Indian leaders

were asked to attend and speak to the western Attorneys General. Likewise addressing the western Attorneys General were those who in the past have presented the principles of law which support the Indians claims. In addition, a representative of the Attorney General of the United States was present.

There was brought forth from that conference and the Indian guests a well-defined, probably irreconcilable, conflict on numerous propositions ranging from taxation to the adamant refusal of the states to accept the Winters Doctrine as asserted by the Indian leaders. The gravity of the conflicts which now prevail among the Indians and states was clearly established.

As expected, the water issue was vigorously contested among the Attorneys General. Unlike the Washington level, those Attorneys General are daily confronted with the problems of Indian/non-Indian controversies. It is important to observe that the sharpest conflict between the states and the Indians occurs where the largest Indian populations are found and also where the present and future water developments of vast coal reserves are clearly the overriding economic problems. In the "energy belt" states, which include Montana, Wyoming, North and South Dakota, the on-going conflicts between the states and the Indians were sharply delineated.

Little doubt is left that, while the Supreme Court may have the "last say," that last say pertains strictly to the legal issues. It will not be for an extremely long time that the historic conflicts between the states over Indian sovereignty, jurisdiction, title and the ultimate power to control the Winters rights will be resolved. That will occur, perhaps, in the dim, distant future when men now living are no longer alive.

The destiny of the Wind River Indians in Wyoming, the Crow Indians and Northern Cheyenne in Montana; the Fort Berthold Indians in North Dakota; the Cheyenne River Indians, the Standing Rock Indians and the Rosebud Indians in South Dakota presents a most perplexing problem. At the moment, there is a major litigation in Montana involving the Crow on the Big Horn River and the Northern Cheyenne on the Tongue River.[113]

Adding to the controversy, which arose with the western Attorneys General, is the involvement of the Justice Department in all of the cited litigation. In those cases, the conflict of interest within the Justice Department is manifest. On the Crow Indian Reservation in Montana, clashes

between the Indians and the Bureau of Reclamation over the rights to water in Yellowtail Dam and Reservoir continue.[114] That vast impoundment was created by the Reclamation Bureau which constructed the Yellowtail Dam on the Crow Indian Reservation. Efforts by the Secretary of the Interior to sell the impounded waters to an energy corporation initiated a controversy which, momentarily at least, is stalemated.[115]

Wyoming v. United States[116] involves the Shoshone and Arapaho Indians on the Wind River Reservation. Shortly after leaving the Wind River Reservation, the Wind River becomes the Big Horn flowing northland across the remaining portions of Wyoming into the Crow Reservation in Montana and thence into the Yellowstone River. Much of the natural flow of the Big Horn River is impounded behind the Yellowtail Dam, the subject of litigation on the Crow Indian Reservation.

Hundreds of defendants in the State of Wyoming, Indians and non-Indians alike, have been named in the case of Wyoming v. United States. On the Wind River Reservation, the Bureau of Reclamation has constructed a dam impounding most of the water of the stream. The impoundment is known as Boysen Reservoir and it is situated entirely within the Wind River Indian Reservation. The United States Bureau of Reclamation constructed both the Boysen Dam and the Yellowtail Dam without consent by or any arrangement with the Indian tribes involved.[117] Manifestly, the Department of Justice is in an impossible situation. It purports to represent the Bureau of Reclamation and, at the same time, purports to represent the Indian tribes. Thus exists the incredible circumstance of the Indians being forced to rely upon the Attorney General of the United States to formulate the issues in their cases and to present the facts, and simultaneously to represent the Bureau of Reclamation, the interests of which are diametrically opposed to those of the Indians.

As was forcefully brought out at the Seattle Conference of Western Attorneys General, the case of Wyoming v. United States is highly controversial. Wyoming insists that the respective rights of the parties must be determined in the state courts. Indeed, Wyoming was successful in asserting before Judge Kerr of the Federal District Court of Wyoming that the State should proceed to hear the case. The county court is now presented with one of the most perplexing federal problems before any court: How will the conflicts of interest within the Interior and Justice

Departments be resolved in a court that is far removed from the actuality of the threats to the Indian people by reason of the daily violations within the Justice and Interior Departments, both of which are required by law to act as agents for the trustee United States for and on behalf of the Indian people? It is abundantly manifest that neither the Attorney General of the United States nor the Secretary of the Interior can possibly meet the standards of performance required of a fiduciary.[118]

An analysis of the cases alluded to above and the great disparity between legal concepts espoused by the Indians and by the states portend a sharpening of historical antagonism between the states and the Indians. The Indians' interests should be protected by the barriers, provided in the basic laws of the states, which preclude state violations of Indian rights. In all those states, their admission to the Union was conditioned upon either implicit or explicit recognition that the National Government has exclusive and plenary power over the Indians and the property under the Constitution.[119]

Whether a coalescence of the political power of the states and their industrical constituency will override the law and conscience which should protect the Indians against the loss of the Winters rights is one of the grimmest issues with which the American Indians in the western United States are now confronted. Markedly, however, the proposed National Water Resources Management Policy Committee has opened a way through which the Indians may have their "day in court." That court may very well be the Senate of the United States. The Indians are now seeking to bring before the Judiciary Committee the unconscionable course of conduct of the federal agencies acting in concert with the states to develop a water policy that is contrary to the nature and magnitude of the Indian Winters rights and the rights of the Indians to survive.[120]

1. Indian Winters Rights Are Immune From State Control

Immunity from state control is vital to the survival of Indian nations and tribes. Most assuredly, the continuity of the Indian nations as distinct, independent and identifiable political entities is an impossibility if the states are in a position to veto federal action on behalf of the Indians. Evolution of the Federal-Indian relationship is deeply rooted in this Nation's history. It was no happenstance that those

who forged the Constitution in the dead ashes of the Articles of Confederation were well aware of the positive need to separate the Indian nations from interference by the states. In 1787, the founders of this Nation were surrounded by hostile British, French and Spaniards. Even more threatening were the yet powerful Indian nations within and bordering the thirteen original states. So it was that the people of the states delegated to the central government the exclusive and plenary power over Indian affairs.[121] Since the Ordinance of 1787[122] establishing the then Northwest Territory, those concepts have been repeatedly announced -- and as frequently violated -- by this Nation.

It is most relevant that each successive generation of Indians is confronted with a new and eager group of state officials who avidly seek to extend the jurisdiction of those quasi-sovereigns which they represent into and upon the properties and affairs of the Indian people. Yet there are few propositions of basic constitutional law which are more firmly established than those which declare that the National Government, including its rights to the use of water, is immune from state control, state administration or interference. The Supreme Court has long recognized this principle.[123]

It is clear that both federal water rights and Indian water rights are, under the Constitution, immune from state control.[124] In First Hydro-electric Coop. v. Federal Power Commission,[125] the Court held the laws of Iowa could not interfere with the federal resources in navigable streams. Identically the same rationale was adopted in Federal Power Commission v. Oregon,[126] (the Pelton Decision) involving the rights to water in nonnavigable streams which traversed federal lands and which had been withdrawn for power purposes. In the Pelton Decision, Indian treaty rights were also similarly exempted from the control of the states. The Supreme Court held that the laws of Oregon could not interfere with the administration of the federally withdrawn lands or with water rights on the federally withdrawn lands, or the water on the Indian lands. To allow interference by either the States of Iowa or Oregon, the Supreme Court declared, would place them under the jurisdiction of those States. There would then be recognized that state authority could preclude the National Government from fulfilling its obligations. That, said the Court, would be opposed to the Constitution of the United States.[127]

In the formative years of the Union, Justice Marshall explained the rationale for the concepts which preclude state interference with the authority delegated to the United States under the Constitution:

> "To impose on [the United States of America] the necessity of resorting to means which it cannot control, which another government [the states] may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs and is incompatible with the language of the constitution."[128]

Quite obviously, if the states had jurisdiction over the Indian water rights, they would be in a position to make it totally impossible for the Indian people to exercise those rights. Hence, the possibility of Indian survival on their arid and semi-arid reservations would be greatly interferred with or rendered totally impossible.

The concept of the National Government's absolute independence from state control in the exercise of its delegated power has been reviewed in detail in the field of Indian water rights. In rejecting the assertion that state laws could be exercised to violate Indian water rights, the court of appeals, in Winters,[129] quoted extensively from United States v. Rio Grande Dam and Irrigation Company.[130] That decision, rendered by the Supreme Court, involved the power of states to adopt laws respecting the appropriation of water within their jurisdictions. Conceding that the states could adopt the doctrine of prior appropriation and reject the common law doctrine of riparian rights, the Supreme Court declared, nevertheless, that each state must recognize two limitations in regard to this Nation's rights to use of water:

> "First, that in the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.
>
> "Second", that it is limited by the superior power of the general Government to secure the uninterrupted navigability of all navigable

> streams within the limits of the United States."[131]

Exactly the same precepts are applicable to Indian people and their properties. Congress, having the primary charge under the Constitution to perform the trust obligations for the Indian people, may not be interferred with to any degree by the several states.[132]

On repeated occasions, the Supreme Court has declared that the states may not interfere with the power Congress exercises over properties, the titles to which reside with the National Government. In regard to a federal forest, the Court said:

> "[T]he power of the United States to protect its lands and property does not admit of doubt...the game laws or any other statute of the state to the contrary notwithstanding."[133]

Earlier, the Court had declared that the Congress could not place federal property under the control of the states. To do so would have been tantamount to placing that property "completely at the mercy of state legislation."[134]

The concepts that preclude delegation of Congressional powers to the states or to anyone else are stated in the following:

> "It is a cardinal principle of our fundamental law, inherent in our constitutional separation of the government into three departments and the assignment of the law making function exclusively to the legislative department, that the legislation cannot abdicate its power to make laws, or delegate this power to any other department or body."[135]

Specifically, the Supreme Court has stated: "Congress cannot transfer its legislative power to the states -- by nature this is non-delegable."[136]

An example of the power of the United States, relative to its trust relationship with Indians and the means of enforcing it by Congress, is the guarantee contained in the language of the Enabling Act, passed February 22, 1889, pursuant to which the inhabitants of the then territories of Dakota, Montana and Washington "may become the States of North Dakota, South Dakota, Montana and Washington, respectively."[137] Congress, then in the exercise of its power to admit the states into the Union in fulfillment

of its obligations as trustee for the Indian tribes and people, and to establish needful rules and regulations for the Indian tribes, prescribed these conditions:

> "That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title...to all lands lying within said limits owned or held by any Indian or Indian tribe...."[138]

Moreover, Congress provided additional conditions to the admission of these states into the Union by declaring:

> "[until] the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States...."[139]

Thus, the independence of the Indian water rights from control by the states is exemplified by the language set forth in the enabling acts and in the constitution of the states.[140]

United States v. Ahtanum Irrigation District[141] is a prime example of the states' invasions. There, the State of Washington contended that it had power to control, manage and regulate the water resources of the Yakima Indian Nation. The Court of Appeals for the Ninth Circuit states:

> "It is too clear to require exposition that the state water rights decree could have no effect upon the rights of the United States. Rights reserved by treaties such as this are not subject to appropriation under the state law, nor has the state power to dispose of them."[142]

Lest Washington fail fully to comprehend what the Ninth Circuit had to say, it added these unequivocal terms:

> "No portion of that volume of water or of the right to the use thereof, was open to appropriation or other acquisition under state law by the defendants or their predecessors in interest."[143]

It is of interest that in the Colville case, the State of Washington,

when it moved to intervene on behalf of Walton, drastically limited its claimed jurisdiction, but was nevertheless in error in its contention.[144]

A comparable position has been taken by the State of Washington relative to the Chamankane Creek adjudication involving a boundary stream for the Spokane Indian Reservation.[145] There the Spokane Tribe is asserting that the natural flow of water for Chamankane Creek Falls may be preserved and maintained against the State and its grantees for scenic and esthetic beauty. The assertion is made pursuant to the Winters Doctrine. The State is declaring that only twenty cubic feet per second are required to maintain the falls; the Tribe asserts that in the state of nature, thirty second feet of water are required. The State of Washington is asserting, moreover, that ten cubic feet per second are surplus over and above the natural flow and under state jurisdiction. Hence, says the State of Washington, it is empowered to issue certificates of water rights for that surplus. In both the Walton and Chamankane cases, the Tribes are vigorously resisting the States' contentions and denying that the State has jurisdiction, referring to the Enabling Act and the Constitution which exempt Indians and their properties from state jurisdiction.[146]

An element of vast importance in regard to the conflict among the Indian nations and tribes and the states is the need to protect Indian Winters rights throughout the entire watersheds of the several states in which they are found. The Indians, like other owners of water rights in a stream system, can force recognition of those rights beyond the boundaries of their reservations to the very wellsprings where the waters upon which they rely have their source. Utah's highest court, in explicit terms, has made that declaration, both as to surface and groundwater.[147] The New Mexico Supreme Court, citing the laws of the State of Colorado, is in full accord with Utah on the subject.[148] The Court of Appeals for the Ninth Circuit has reiterated and adopted the same concepts to which the western states have generally adhered.[149]

The National Water Commission, the Justice Department and, presently, the Water Resources Council and the Policy Committee formulating the National Water Resources Management Policy are proceeding sharply at variance with the fundamental constitutional precepts of the law. The consequences of that failure are the decisions in United States v. District Court for Eagle County[150] and Colorado River Conservation District v.

United States.[151] In error, those decisions subject the National and the Indian tribes to the jurisdiction of state courts and administrative tribunals in general water adjudications.

2. Misconceptions Indulged In By The Policy Committee As To The Nature Of Titles Respectively Held By The Indian Tribes And The National Government Threaten Both The Interests Of The Tribes And Those Of Our Nation[152]

The titles of Indians occupying Congressional or executive order reservations are derived from the National Government with the priorities of their Winters rights fixed as of the date when the reservations were created.[153] It must be emphasized, however, that once the titles have been vested in the Indians, pursuant to acts of Congress or the Executive Branch of the Government, those titles have the same dignity and value as those of the treaty tribes, only the source of title is different.[154]

Hence it is that the Indian rights are not federal rights and there can be no divestiture of them or impingement upon them absent adherence to the strict principles of due process of law. Quite obviously, the nature, source and character of the title of the National Government to the rights to the use of water for Congressional and executive order reservations are important not only to the United States, but likewise to those Indians from whom those titles were received. To make that determination involves brief reference to the sources of title of the United States to the vast expanses of North America lying west of the Mississippi River.

The first of those acquisitions in the western United States was the Louisiana Purchase in 1803 from France. With that acquisition, title to the drainage west of the Mississippi River, including the Missouri River basin with all of the attendant water rights, became the property of the United States and title resided in it after the acquisition.[155]

In 1846, the United States acquired from Great Britain the Columbia River and the drainage of that immense stream system.[156] With that acquisition, the lands constituting all or part of the States of Oregon, Washington, Idaho and Montana became part of the Union. By the Treaty of Guadalupe Hidalgo in 1848,[157] the National Government acquired a large portion of the southwestern United States, including parts or all of the States of California, New Mexico and Arizona. Included were the drainages

of the Colorado River, the Rio Grande and other stream systems. The full import of the legal aspects of the investiture of complete title in the National Government was reviewed at length by the Supreme Court in United States v. California.[158]

In Jennison v. Kirk,[159] the Supreme Court recognized that the National Government for a period of 18 years, subsequent to the acquisition of the land included within the Treaty of Guadalupe Hidalgo, took no action with regard to the water rights in that large, arid region. At that time, Congress passed the Act of 1866:[160]

> "[T]he general purpose of the Act...was to give the sanction of the government to possessory rights [to water] acquired under the local customs, laws and decisions of the court."[161]

By the Act of 1866, the National Government simply recognized that water rights that had been exercised by trespassers on the public domain could continue to be exercised by them and that title to those rights would become vested in the trespassers.

Title to the water rights thus passed from the United States to those who previously had no interest in the rights until the Act of 1866. Eleven years after the Desert Land Act of 1877, the United States Congress made available for appropriation on the "public lands" of the United States title to the rights to the use of surplus water found upon arid and semi-arid lands.[162]

The key words in the Desert Land Act of 1877 are in the term "public lands," to which the United States held title and to which it had vested in it the title to the water rights. Those public lands are the ones which were open "unqualifiedly to sale and disposition...."[163]

As declared in United States v. O'Donnell[164] the rights to the use of water flowing over and through the national forests, national parks and national military enclaves were not included in the Desert Land Act of 1877, and were not open to appropriation, then or now.

One of the key cases recognizing that title resides in the National Government to the unappropriated water rights on the public domain is California Oregon Power Co. v. Beaver Portland Cement Co.[165] The crucial words from California Oregon Power are vital to a comprehension of the nature and extent of the water rights held by the United States of America:

> "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately."[166]

The Court made the following statement in reference to the Desert Land Act of 1877:

> "The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the [public] land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named."[167]

Any doubt as to the Court's interpretation of the consequences of Congressional intent in the Desert Land Act of 1877 in separating the title to the water rights from title to the lands was dispensed with by this language:

> "The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location."[168]

It is important to observe that the Supreme Court in California Oregon Power favorably cited the case of Howell v. Johnson[169] in support of its most crucial decision:

> "The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper. ...It is urged that in some way the state of Montana has some right in these waters in Sage creek or some control over the same. It never purchased them. It never owned them."[170]

The Supreme Court of Oregon in Hough v. Porter[171] adhered to precisely the same principle as to the ownership by the United States of the

unappropriated water rights on the public domain. It is important in that connection that the Supreme Court in California Oregon Power characterized Hough v. Porter as being "well reasoned."[172] As declared in Howell v. Johnson and Hough v. Porter, which were reaffirmed by the United States Supreme Court in California Oregon Power, the United States has the status of the grantor of rights to the use of water to a prior appropriator who has complied with the state statutory procedures. The state statutes for acquiring appropriative rights to the use of water simply "trigger" the transfer of title to the water rights from the United States to the prior appropriator. It is without question or equivocation that the Supreme Court was reiterating and reaffirming the long-established principles of law that the United States, under the property clause,[173] had title to and plenary control over those water rights and the authority to dispose of them.

Relative to the lands reserved by the United States for its own use and purposes, through the withdrawal for national parks, national forests or other enclaves, the titles to the water rights were never separated from the lands.[174] When the Congress or the Executive Branch of the Federal Government created an Indian reservation and Congress recognized title to be in the Indians, there passed from the United States to the Indian tribes not only the title to the lands, but similarly the title to the water rights appurtenant to those reservations.[175] Most assuredly, the withdrawal of lands by the National Government for congressional or executive order reservations did not "create" new titles to the water rights for the Indians. The water rights for congressional or executive order reservations are to be distinguished from treaty reservations for which the Indians retained their rights to the use of water for themselves, i.e., did not grant those rights to the use of water to the United States. The title to the rights to the use of water for congressional or executive order reservations, which were transferred to the Indian tribes, had previously resided in the United States. It acquired those water rights with the lands constituting the Louisiana Purchase, the Oregon Territory and the lands ceded to it by Mexico under the Treaty of Guadalupe Hidalgo.

Equally manifest is that an action by an Indian tribe on its own behalf or by the National Government for the benefit of the Indian tribes, to quiet title to the Indian rights does not "create" a new title but only

evidences by decree the title resided in the tribe at the time the action to quiet title was initiated.[176]

A resume of the preceding history and law is as follows: (1) The Indian tribes, pursuant to their treaties, had reserved for themselves title to their lands and rights to the use of water from time immemorial; (2) where there were no treaties, the United States transferred its full title to the lands and water rights to the Indian nations and tribes on congressional and executive order reservation; (3) in regard to the titles in (1) and (2), quiet title proceedings have been brought by the Indian tribes on their own behalf by the United States to have declared, adjudicated or determined the pre-existing title of the Indian tribes.

Despite these facts, the National Water Commission said in its final report:

> "Arizona v. California also created a new species of water right in the Federal Government, the reserved right for certain Federal establishment."[177]

As part of that statement, the National Water Commission set forth a footnote which is of extreme importance to the Indian people: "This new species of water right originated in Winters v. United States...dealing with Indian water rights...."[178] Although the National Water Commission stated that in some manner the United States undertook to "create a water right for an Indian Reservation,"[179] it included this language from Winters that refutes the theory that the United States "created" a water right:

> "The lands [of the Indian reservation] were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation [Indian rights to the use of water] were deliberately given up by the Indians and deliberately accepted by the Government.... The Indians had command of the lands and the waters - command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? ... If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or

> deceived by its negotiators. Neither view is possible. The Government is asserting the right of the Indians."[180]

Manifestly, the Indian water rights were not created by Winters; their titles to those rights was already reserved by their 1855 Treaty. Otherwise, the Supreme Court could not have made the statements declaring that the Indians did not convey their rights to the use of water. It is additionally manifest that those rights were in existence and, having been retained by the Indians, were neither "created" by the Supreme Court nor were they "created" by the United States.[181] This partial quotation from Winters was also set forth in the final report of the National Water Commission: "This was done May 1, 1888 [the date the Reservation was established by an agreement with the Indians]...."[182] Had that partial quotation been set forth in full, it would have further refuted the misconception of the National Water Commission that in some manner the United States or the Supreme Court had "created" a "new species of water right." Following is the full water text of the quotation from Winters:

> "This was done May 1, 1888, and it would be extreme to believe that within a year [Montana was admitted to the Union in 1889] Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren water -- took from them the means of continuing their old habits, yet did not leave them the power to change to new ones."[183] [Emphasis added]

The National Water Commission also made the following statement in its final report:

> "Having disposed of the issue of the power of the Government to create a water right for an Indian Reservation, the Court was faced with the question of the exercise of the power.[184]

However, the Supreme Court directly refuted the theory that the rights were created in Winters:

> "If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or

> deceived by its negotiators. Neither view is possible. The Government is asserting the rights of the Indians."[185] [Emphasis supplied]

Unfortunately, the issues here are not academic. If they were, the errors of the National Water Commission could be ignored. However, the Policy Committee of the Water Resources Council, which is presently formulating the National Water Resources Management Policy, adheres to the misconceptions of the National Water Commission. Comporting fully with the concepts of the final report of the National Water Commission, the Water Resources Council published the following statement in the Federal Register on July 25, 1977:

> "FEDERAL RESERVED WATER RIGHTS, Statement of the Problem:
>
> "A judicially created doctrine generally recognized that when the United States establishes a Federal reservation such as a national park, forest, wildlife refuge or military installation, at least as early as the date the reservation was established, a sufficient quantity of unappropriated water is reserved to accomplish the purposes for which the land was reserved."[186] [Emphasis supplied]

This last quoted statement was changed when the Indians objected and the reference to Indian reservations was dropped from the statement. The demands of the Indians were met. Moreover, the following references were deleted from the statement: Winters v. United States,[187] Arizona v. California,[188] and Cappaert v. United States.[189]

It is reasonable to assume that the forced deletion of the reference to the Indian reservations and the fact that the citations were dropped by the Water Resources Council does not and will not change the adherence of that body and its powerful land and water constituencies to the misconceptions of the National Water Commission. The erroneous concepts of both Indian rights and federal rights continue to be a grave threat to the Indians. It is equally clear that the attacks upon "federal rights" have been effectively launched by the Water Resources Council. Those attacks are as fallacious as the assaults originally launched upon the Winters rights, which subsequently the Water Resources Council was forced to retract.[190]

The threats against the Indian water rights continue irrespective of the declaration that Indian rights are not federal rights. In that connection the following statement was also placed in the Federal Register:

> "A study of policy rendering Indian water rights will be undertaken initially by the new Assistant Secretary of the Interior for Indian Affairs. This study will be coordinated as a part of the overall study of water policy reform."[191]

Against that background, reference must be made to United States v. District Court for Eagle County[192] and Colorado River Water Conservation District v. United States[193] (commonly known as Aiken), pursuant to which federal rights and the Indian rights to the use of water have been subjected to the jurisdiction of state courts. Those two decisions are the direct product of the fallacious concepts of the National Water Commission, the Water Resources Council and the Department of Justice.

3. The Eagle County And Akin Decisions Are Products Of The Misconceptions Of The Water Resources Council And The Department Of Justice, All As Reviewed Above

In Eagle County[194] and Akin,[195] the Supreme Court declared that the McCarran Act subjected both federal water rights and Indian water rights to the jurisdiction of the state courts. The history of the McCarran Act, as now interpreted, will give some background for the reasons the Congress purportedly waived the immunity of the Indian tribes to state court jurisdiction.[196] Basically, the McCarran Act, a rider to the Justice Department Appropriation Act of 1952, had as its objective to deny the United States Marine Corps its day in court to have its rights to the use of water in the Santa Margarita River quieted against the adverse claims of the Fallbrook Public Utility District, the then Vail Estate, the State of California and others.[197] Despite the fundings limitation, the Marine Corps provided funds to prosecute its case successfully against the Fallbrook Public Utility District. All of the claims of the Fallbrook District, which were adjudicated, were declared to be junior in time to those of the Marine Corps.[198]

It is important, moreover, that in Fallbrook the Indian Winters rights, involving three reservations, were likewise sustained as being

prior and superior to those of the Fallbrook District. It is also important that those Winters Doctrine rights were primarily groundwater rights and established the precedent in that case for using groundwater almost exclusively to meet the Winters Doctrine rights of the Ramona, Cohuilla and Perchanga Indian Reservations.[199]

Contemporaneously with the attacks upon the Marine Corps water rights in the Santa Margarita River by the Fallbrook Public Utility District and the Bureau of Reclamation, the United States was preparing to intervene in the case of Arizona v. California,[200] which had been filed by Arizona with the Supreme Court. In the petition to intervene, the large Indian water rights in the Lower Colorado River were alleged. The Indian rights were pleaded as being prior and superior to the non-Indian claims along the contested portion of the Colorado River.[201] The language of the petition by the United States, originally filed November 2, 1953, was quoted in its entirety. The attacks by the western states in general and the States of the Colorado River Basin in particular were immediate and intense. In fact, they were so great that the Attorney General directed the withdrawal of the petition, an event never previously attempted. After the withdrawal, the Indian claims were modified to comport with the demands of the state.[202]

Meanwhile the district court declared that a 1941 Stipulated Judgment between the Rancho Santa Margarita and the Vail Estate, the rights to which were acquired by the Marine Corps, had been abrogated by the conduct of the Marine Corps. The Marine Corps appealed to the Court of Appeals for the Ninth Circuit. The Fallbrook Public Utility District did not appeal the junior priorities awarded to it. It nevertheless filed a cross appeal alleging that the Marine Corps could not use the riparian rights which it claimed for military purposes. The Court of Appeals for the Ninth Circuit stated, among other things, that the "Fallbrook Public Utility District is a relative newcomer on the River."[203] Thus the court said Fallbrook's rights were junior to the Marine Corp's riparian rights. In contending the Marine Corps could not have riparian rights, Fallbrook likened military purposes to those of a municipality asserting that "municipal or other extraordinary purposes must be secured by appropriation."[204] The Court of Appeals rejected Fallbrook's contention and then referred to the California Constitution which provided that "riparian rights" may be used "for the

purposes for which such lands are or may be adaptable."[205] The appellate court reversed the decree in favor of the Vail Estate, awarding to the Marine Corps the rights to enforce that decree against the upstream properties of the estate and, of course, its successors in interest.

The Attorney General's retreat, however, presaged events that now confront the Indian people. At present, there is a motion pending in the Supreme Court, in Arizona v. California,[206] requesting the Supreme Court further to denigrate the Indian water rights by a compromise stipulation prepared by the states, the Solicitor's Office of the Department of Interior and participated in by the Justice Department lawyers who had the obligation of representing the rights of the Indians before the Supreme Court.[207] Perhaps Arizona v. California,[208] due to its background, the methods pursuant to which it was presented, and the circumstances prevailing today, reflects the continuing threat to the Indians of political machinations like no other case.[209]

At all times after the Santa Margarita River litigation and the initiation of Arizona v. California, those who adhere to the concepts of state rights have steadfastly attacked the rights of both the Nation and the tribes. For many years, the United States successfully defended itself against those attacks and was able to avoid being subjected to state court jurisdiction.[210] There has been a steady erosion of the Justice Department's representation of Indian people, particularly in connection with the issues of state rights versus Indian rights. Rather than vigorously attempting to avoid the consequences which will necessarily emanate from subjecting Winters rights to state court jurisdiction, the policies of the Department of Justice have invited that result.[211] The course of conduct was fully in keeping with that adopted in Arizona v. California in which the Justice Department recanted from the stance that it had taken on behalf of the Indian people in the Lower Colorado River.[212] Quite obviously, the state pressures far exceeded the capacity of the Department of Justice to recognize the duality of sovereigns and the necessity of the separation of the federal rights from those of the states.

The history of Eagle County[213] is an explicit example of the metamorphosis of the Justice Department from an agency which for some years had effectively represented the Indian interests to an agency refraining from strong Indian advocacy. Increasingly, the Justice Department is

willing to subordinate federal interests to state interests. In keeping with that policy and that of the National Water Commission, the Justice Department throughout the proceedings in Eagle County, from the lower court of Colorado through the Supreme Court, and at all time thereafter, adopted a policy of acquiescing to state court jurisdiction.

The procedure facts in Eagle County are simple: On November 2, 1967, the Attorney General of the United States was served with a summons to appear and defend the claimed water rights within the national forest and Bureau of Land Management areas situated in Eagle County, Colorado. The notice asserted that the joinder of the United States was pursuant to the McCarran Act.[214]

The Justice Department filed a motion to dismiss. That motion was denied by the District Court for Eagle County and the time for offering evidence was set for October 28, 1968. Thereupon, the Department of Justice, on October 14, 1968, filed with the Supreme Court of Colorado an "Application for Writ in the Nature of Prohibition." Evidencing its willingness to accept state court jurisdiction, the Department of Justice stated:

> "[I]f this Court were to find that this Application and its supporting brief misstate Colorado law and were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriated rights, most of the objections of the United States to these adjudications would be removed."[215]

The Department of Justice also stated:

> "While the United States could not, even then, be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river assured it could have its rights properly adjudicated if it chose to appear as a plaintiff in a Colorado Water District adjudication.
>
> "While no representation can be made at this time as to what the United States would do in any particular case, it can be represented that the Department of Justice would raise no general objection to appearances as plaintiff in

> appropriate cases under the supposed circumstances."[216]

The result of the Justice Department petition to the Colorado Supreme Court to prohibit the Eagle County Court from proceedings against the rights of the United States was never in doubt. Moreover, the briefs filed by the Department of Justice, while relying heavily upon the Winters Doctrine, never at any time distinguished between the Indian Winters rights and the Forest Service and the Bureau of Land Management rights that were before the Eagle County Court. The Colorado Supreme Court declared that the water rights of the United States were subject to state court jurisdiction.[217] The Colorado Court also adopted the Department of Justice's position and proceeded on the rationale that the Indian rights were, as depicted to it, federal rights.

An analysis of the Justice Department's brief to the Supreme Court of Colorado and that Court's Eagle County decision made it clear that the Indian rights were imperiled by the course of conduct that had been followed. That conclusion was conveyed to the Justice Department. The Department of Justice was requested in its petition for certiorari to the Supreme Court to clearly distinguish and strongly urge that Indian rights are not federal rights. Numerous resolutions and letters from the Indian tribes were submitted to the Solicitor General of the Department of Justice.[218] On November 6, 1970, Erwin N. Griswold responded to the Mojave Tribe:

> "Please be assured that the government intends to make the Supreme Court fully aware of its obligation as trustee of Indian rights in this matter, and of any bearing that the decision may have on those rights."[219]

A similar letter from the Solicitor General went to the Agua Caliente Tribes, which gave assurances that the Indian rights would be protected. The rights of the Fort Mojave Tribe to the use of water, which were the res or subject matter of the Eagle County case, are not difficult to perceive. The Eagle River is a major tributary of the Colorado River. A rights to the water to be of value must be protected to the very wellsprings of the source of that supply. Hence, the Fort Mojave Indian Tribe's action stemmed from the fact that it had a major interest in the outcome of the

litigation. That Tribe had taken the leadership in demanding from the Solicitor General that the Supreme Court be advised that the Indians had a genuine interest in the outcome of the litigation.

Those assurances were given to the Fort Mojave Tribe by the Solicitor General. In total disregard of those commitments, the Solicitor General adhered to the errors committed in the briefs submitted to the Supreme Court of Colorado. There was no effort to distinguish between the Winters rights and the federal rights of the national forests, the national parks, national wildlife and other rights to the use of water, as decreed in Arizona v. California. Under those circumstances, it was necessary to make an in-depth review to demonstrate the grave threat to Indian people by the course of conduct that had been adhered to by the Solicitor General in clear violation of his commitment to the Indian people.

Prescience was not required to foretell the consequences of the conduct of the Justice Department. Accordingly, a memorandum, entitled "A Preface to Disaster for the American Indian People," was prepared at the direction of the Commissioner of Indian Affairs. In that manner, the Indians were well aware of what could be expected when the Supreme Court rendered its Eagle County decision.

On March 23, 1971, "A Preface to Disaster for the American Indian People," was released as an official memorandum of the Bureau of Indian Affairs. On March 24, 1971, the Supreme Court rendered its opinion in Eagle County.[220] The Court declared that the McCarran Act did, indeed, subject federal water rights to state court jurisdiction. The Court made this statement:

> "As we said in Arizona v. California...the Federal Government had the authority both before and after a State is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands'.... The federally reserved lands include any federal enclave. In Arizona v. California, we are primarily concerned with Indian reservations.... The reservation of waters may be only implied and their amount will reflect the nature of the federal enclave."[221]

As a shadow follows the substance, in Akin,[222] rendered five years to the day following Eagle County, the Supreme Court adopted the rationale of Eagle County declaring that Indian rights were subject to state and

administrative tribunals for the adjudication of water rights. At an oversight hearing before a subcommittee of the Senate Judiciary Committee, the Assistant Attorney General for Land and Natural Resources summarized the status of the Indians before the state courts pursuant to Akin. Particular reference was made to the historic and present hostility of state courts, agencies and personnel to Indian rights and interests.[223]

That correct assessment of the hostility of the states suffices to explain the refusal of Indian leadership and the tribes willingly to accept the McCarran Act as interpreted in Akin. They have made demands to have Congress amend the McCarran Act specifically to exempt Indian rights to the use of water from its applicability.

Unless and until the McCarran Act is amended, there are and will be numerous serious questions presented by Akin. There is yet to be tendered for review by the courts the constitutional authority of Congress to pass over to the states jurisdiction, administration, control and allocation of the Indian Winters rights. To utilize the terms of Camfield v. United States, the effect of Akin is to place Indian rights "completely at the mercy of state legislation."[224]

It is clear from an analysis of the variant state systems for the adjudication, control and administration of rights to the use of water[225] that there must be, of necessity under Akin, an irreconcilable conflict among the states and both the federal and Indian authorities to control the administration, use and allocation of water resources within the western reservations. In Wyoming, for example, the irreconcilable conflict results from the highly centralized and exclusive state control of all aspects of water rights which come within its jurisdiction. It is thus a most crucial problem for the Indian people if their rights are subjected to the control of that state.[226]

There is, necessarily, a most serious question about the constitutionality of the McCarran Act. That question arises when state constitutional, statutory and administrative controls over water rights preclude any exercise of authority by either the United States or the Indian tribes over Indian water rights. It must be further recognized that state procedures and state regulations respecting water rights stem from police power and not from proprietory ownership by the states. Utah's Supreme Court has made the following statement:

> "The statutory declaration that 'the water of all streams and other sources in this State...is hereby declared to be the property of the public' does not vest in the state title or ownership of the water as a proprietor. It is a community right available to all upon compliance with the law by which that which was once common to all may be brought within the domain of private right to use, or under certain circumstances private and exclusive possession and ownership."[227]

Adding to the serious constitutional questions of Congressional relinquishment under the McCarran Act, as interpreted in both Eagle County and Akin, is the rationale of the decision of the Colorado Supreme Court which was affirmed by the Supreme Court in Eagle County.[228] The Supreme Court of Colorado in United States v. District Court for Eagle County reviewed in some detail the history of the laws of Colorado and their application. The Court then stated:

> "Winters v. United States...involved water for an Indian reservation reserved prior to the admission of Montana into the Union. It was argued that the subsequent admission of Montana into the Union 'upon an equal footing with the original States'...repealed the reservation of water. This argument was not accepted. We are not concerned here with water rights asserted by the United States prior to Colorado's admission into the Union....
>
> "We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn."[229]

The meaning of those cryptic statements remains unclear. A reasonable interpretation would be the denial of the concepts of the Winters Doctrine by the Colorado courts. That would not be a surprising course of conduct in light of the long history and tradition of the State of Colorado as a strict appropriation state.

There are serious additional questions that must be raised about practices and procedures in those jurisdictions where adjudication

proceedings are brought by the states in their own names. For example, now pending are the cases of Wyoming v. United States and New Mexico v. United States involving Indian water rights. Neither Wyoming nor New Mexico assert any proprietary rights against the United States. Those proceedings do not appear to be "cases and controversies" within the purview of the Constitution of the United States.[230]

The definition of cases and controversies within the purview of the Constitution may very well exclude proceedings of the nature of those initiated by Wyoming and New Mexico against the United States relative to both federal rights and Indian rights to the use of water. Quite obviously, there can be no issue joined with the states who are making no proprietary claims but are acting only as quasi-sovereigns exercising their police powers.

In State v. Rank, the City of Fresno asserted that there must be federal compliance with state law, but Fresno had no basis for claiming water rights. The Court of Appeals for the Ninth Circuit said, in effect, that without rights Fresno had no standing as a party:

> "If and when such rights have been established in accordance with state law, Fresno may be able effectively to protest the impounding of waters by these defendants in contravention of such rights."[231]

The pending case of State ex rel. Reynolds v. Aamodt,[232] United States, Intervenor, involves literally hundreds of decrees being entered in accordance with state procedures without answers being filed or issues being joined, and there are no hearings on them. The state engineer simply proposes the priority and magnitude of the claim to the rights to the use of water and a copy of the order is served upon the parties. Thereafter, the parties are afforded an opportunity to be heard on the correctness of the determination by the state official. That is scarcely what would be known as a case and controversy in the classical form contemplated under the Constitution of the United States.

There remains, therefore, the constitutional question whether the Federal Government can totally abdicate its control over the adjudication of Indian water rights, dispensing with the safeguards of pleadings and the right of full cross-examination in an adversary proceeding.

Those constitutional questions should be resolved antecedent to attempts fully to adjudicate Indian water rights with the attendant threat to the Indian rights, particularly in light of the inherent hostility between states and Indians.

III. ADMINISTRATIVE CONTROL AND ALLOCATION OF WATER ON INDIAN RESERVATIONS

Hostility between the Indian nations and the states has been the hallmark of Indian-state relationships. Manifestly, the consequences of Akin, subjecting Indian water rights to the state courts, will add to that hostility. The strife among the states and the Indians stems from the earliest moment of this country's history. At all times, it has been a matter of great national concern. President Washington, in addressing Congress, declared that there was a great need "for restraining the commission of outrages upon the Indians, without which all pacific plans must prove nugatory."[233] As emphasized by the first President, there has been and is now a strong anti-Indian feeling among the states and their constituencies. This feeling has frequently given rise to the fact that the treatment of Indians in all types of transactions has tended to defraud them and extort their property.[234] President Washington's statements were made in 1793, but in 1978, the threat against the Indian people is even greater. Demands by the states and their constituencies that Indian water rights be greatly reduced for the benefit of the states, and that Indian water rights be administered by state officials will greatly add to the acrimony that has historically existed.

The administration of Indian water rights and the adjudication of those rights by the states is one of the most crucial and controversial issues confronting the Indian people in the west today. Thus Akin has precipitated a confrontation, the resolution of which is far from being at hand. Some tribes have adopted their own water codes to administer their rights on their reservations. The Indian water codes are thus sharply at variance with Akin which would permit state adjudication and administration of the Indian water rights. In effect, Akin will suppress attempts by the Indians to administer their own water rights and will denigrate the power of the Indian tribes to exercise their inherent authority of self-government.

Adding to the great difficulties with regard to the administration of

Indian water rights within the reservations is the fact that the water codes that had been adopted by the Indian tribes, after careful preparation and analysis, were submitted to the Secretary of the Interior for his approval in accordance with the requirements. Rather than approving those water codes, the Secretary of the Interior rejected them. On January 15, 1975, by a memorandum to the Commissioner of Indian Affairs, the Secretary directed that there be no further approval of Indian water codes.[235] The memorandum demonstrates that the Department of Interior was, at that time, considering the preparation of rules and regulations for the control of water resources on the Indian reservations. Under the Carter Administration, on March 17, 1977, the Department of Interior, Bureau of Indian Affairs, published in the Federal Register, under the heading of "Indian Reservations, Use of Water," proposed rules and regulations for the distribution of water on the reservations.[236] These "proposed rules" were designed "(a) To fulfill the Department's trust responsibility...; (b) to recognize, provide for, and assist in the exercise of the sovereign authority of Indian tribes within their reservations to govern the use of all reserved water rights therein...."[237] Included in the rules and regulations was a purported delegation of authority by the Secretary of the Interior to the Indian tribes. That delegation was conditioned upon the acceptance by the tribes of the proposed rules and regulations. The language of the rules and regulations, when first considered, appeared to indicate a willingness on the part of the Department of Interior to recognize the Indian Winters rights and also to recognize the sovereignty of the Indian people to administer those rights. Nevertheless, when an in-depth study had been completed, it revealed that the proposed rules and regulations fell far short of protecting the rights and interests of the Indian people. Based upon that review, a memorandum dated May 19, 1977, was prepared, which was furnished to the Indian people. That memorandum was entitled, "An Analysis of Proposed Secretarial Rules Respecting 'the Use of Water on Indian Reservations' and the Recommended Rejection of Them." The "Analysis" contained the conclusions from the proposed rules and regulations: (1) Require the Indians to recognize that non-Indian purchasers of formerly allotted lands will receive Indian Winters rights measured by the extent that those rights had been exercised by the Indians prior to the relinquishment of the allotments to non-Indians, and that the

purchaser would stand in the position of an Indian holding Indian rights to the use of water; (2) the non-Indian would have a priority commensurate with that of the Indians; and (3) that, for practical purposes, the administrative power would, in turn and fact, reside with the Secretary of the Interior acting for and through the bureaucracy.[238]

The history and background of the rules and regulations in question are extremely important. They emanate from conferences held between the Assistant Attorney General for Land and Natural Resources and the Solicitor of the Department of the Interior. The legal concepts, which are used in the rules and regulations of the Secretary, are predicated upon a letter dated September 28, 1976, from the Solicitor to the Assistant Attorney General for Land and Natural Resources.[239] Copies of that letter and the proposed rules and regulations are made a part of the "Analysis."

It is of great importance that the proposed rules and regulations were promulgated for use in United States v. Bel Bay Community.[240] The facts of Bel Bay are reviewed in depth in the "Analysis."[241] It is further revealed by the "Analysis" that the proposed rules and regulations are directly in contravention of the position and interest of the Colville Confederated Tribes in the Walton case, as well as being sharply at variance with the Colville Water Code that has been prepared and adopted and is, in fact, being implemented at the present time for the use and distribution of water within the Colville Indian Reservation. Another source of conflict between the Walton and Bel Bay cases is that the rules and regulations are predicated upon Title 25, section 381 of the United States Code.[242]

The Indians in both Walton and Bel Bay reject the Interior and Justice Departments' interpretation of section 381. The tribes emphasize that the explicit language clearly limits the operation of the statute to the distribution of water in a manner which would "secure a just and equal distribution thereof among the Indians residing upon any such reservation." It is insisted by the Indian people that the language, being clear and explicit, is not subject to interpretation. Nevertheless, both the Solicitor's Office and the Justice Department assert that section 381 authorizes the Secretary of the Interior to allocate water to non-Indians. There are thus several irreconcilable conflicts between the Interior Department and the Justice Department and the Indian tribes involved in both Walton and Bel Bay.[243]

Another area of very serious disagreement among the Indian tribes and the Departments of Interior and Justice stems from the interpretation placed by those Departments upon United States v. Powers.[244] There is also a most serious dispute over the applicability and the interpretation placed by the two departments upon the decision in Hibner v. United States,[245] rendered by the federal district court in Idaho. Both Powers and Hibner were heavily relied upon by the Interior and Justice Departments in the formulation of the proposed rules and regulations. The interpretation of those two cases appears in a letter from the Solicitor of the Department of Interior to the Assistant Attorney General for Land and Natural Resources. In that letter, it is declared that "the Indian allottees and their non-Indian successors in interest do hold some reserved rights to the use of water."[246]

In the Walton and Bel Bay cases, the Indians deny that the Powers decision may be relied upon to sustain the proposition fostered by the Interior and Justice Department lawyers that the Powers decision recognizes that non-Indian purchasers of formerly allotted lands acquired water rights. The "Analysis" of the rules and regulations reviews in great detail the history of the Powers decision, a case which remains extremely important. The Department of Justice asserts throughout that under Powers the Crow Indians do not have Winters rights under the 1868 Treaty. Rather, it is asserted that the water rights on the Crow Indian Reservation are held by the Secretary of the Interior. That was probably the first case in which it was clearly asserted that Indian rights were, in fact, federal rights and it is probably the genesis of the present error adhered to by the Policy Committee of the Water Resources Council.[247]

In rejecting the position of the Department of Justice and the Solicitor's Office of the Interior Department that Powers is authority for the passage of Indian rights to the use of water to non-Indian purchasers of formerly allotted lands, the Indian tribes point to the fact that the Powers decision, as rendered by the Supreme Court, had no final determination on any proposition of fact or law. Their conclusion is supported by this statement from the decision in Powers: "The decree of the Court of Appeals dismissing the bill [in the Powers case] must be affirmed."[248] It is asserted by the tribes that nothing was determined and nothing could be concluded from the Powers decision. The tribes emphasize

that the Powers decision is a threat to the tribes because the Department of Justice, in specific terms in the trial court, the Court of Appeals for the Ninth Circuit and the Supreme Court, denied that the Indians had any rights to the use of water on the Crow Indian Reservation. The threat to the Indians from the department's position is a continuing one in light of Wyoming v. United States and New Mexico v. United States.

It is also pointed out by the tribes that the reliance upon Hibner by the Justice and Interior Departments is in error. Hibner purports to hold that a non-Indian purchaser of formerly allotted Indian land succeeded to a right to the use of water of the magnitude being exercised by the Indian at the time when the lands were relinquished to non-Indian purchasers.[249] It is also asserted by the Interior and Justice Departments that the Hibner case is authority for the acquisition of valid state water rights after the acquisition of Indian land. In rejecting the concepts of Hibner, the tribes assert in both Bel Bay and Walton that the lands involved in Hibner were not within an Indian reservation. It is also emphasized by the tribes that Hibner was not only unique because lands involved were not within any reservation and that no tribe made a claim to any of the water rights but further that the Hibner lands were embraced within a cession arrangement entered into between the Indians and the United States, which was unique in character and would have no bearing upon any Indian rights on any Indian reservation.[250]

In light of the "Analysis" and the consensus of the Indian leadership, the rules and regulations proposed by the Secretary of the Interior on March 17, 1977, were rejected. Those rules and regulations have never been approved by the Department of the Interior. It is nevertheless understood that revisions in the rules and regulations are being made and, perhaps, will be offered once more to the Indian people.

At the present time, the Colville Confederated Tribes, the Yakima Indian Nation, the Warm Springs Indian Reservation in Oregon, and the Fort Hall Indian Tribes on the Fort Hall Reservation in Idaho are proceeding either to formulate their own rules and regulations or to implement and enforce the water codes that they have already adopted. It is clear that Akin will cause great difficulty in the administration by the tribes of their own water rights if the explicit language of the states in their administrative codes for water is adhered to by the states. That is a

controversy that must, of course, be resolved. Implicit in that controversy are numerous conflicts involving both the inherent power of the Indian tribes to administer their rights to the use of water and also extremely important constitutional questions that have never been determined. In the future, those matters must be resolved by the Supreme Court of the United States.

IV. CONCLUSION

It is evident that, in the concluding years of the twentieth century, the Indian nations, tribes and people are being tested to the ultimate as to whether they have the strength and tenacity to preserve and protect their life-sustaining Winters rights. Markedly, the outcome of that testing turns upon the tenacity and will of the Indian people to survive as distinct and independent sovereigns within their own reservations.

Buttressing the Indian people in the struggle, in which they are presently engaged, is a formidable body of law which supports them. Further aiding the Indian people in the concluding years of this century is the fact that they are presently far more aware of the power of the law that supports them and which strengthens their will and their ability to survive.

FOOTNOTES

* Indian water rights are predicated upon the concepts enunciated in the Supreme Court decision of the United States v. Winters, 207 U.S. 564 (1908). The Winters Doctrine, as it came to be known, gave Indians rights to the use of water in resources on the reservation to meet their present and future water requirements.

1. New Jersey v. New York, 283 U.S. 336, 324 (1931).

2. See The American Indian and the Law, 40 Law & Contemp. Probl. 1 (1976).

3. Id. at 83-84.

4. See Indian Treaties 1778-1883, 736 (C. Kappler ed. 1975); Treaty with Blackfoot Indians, 11 Stat. 657 (1855) (ratified April 15, 1856, proclaimed April 25, 1856).

5. Act of May 1, 1888, Ch. 213, 25 Stat. 113, 114.

6. Id. at 116.

7. Id. at 577.

8. Moreover, the Court stated: "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it." Id. at 576, 577.

9. Id. at 577 (emphasis added).

10. Id.

11. 161 F. 829 (9th Cir. 1908).

12. Id. at 832.

13. Arizona v. California, 373 U.S. 546, 600-01 (1963) (emphasis added).

14. United States v. Ahtanum Irr. Dist., 236 F. 2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957), on remand, 330 F.2nd 897, rehearing denied, 339 F.2d 307 (1964) cert. denied.

15. Id. 381 U.S. 924 (1965).

16. Id. at 326-27.

17. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973).

18. 31 U.S. 515, 542, 543, (1832).

19. Id. at 556.

20. Id. at 561.

21. Winters v. United States, 143 F. 740, 742, 749 (9th Cir. 1906).

22. See Treaty with the Blackfoot Indians, 11 Stat. 657 (1855).

23. 198 U.S. 371 (1905).

24. Id. at 381.

25. Winters v. United States, 207 U.S. at 576.

26. Arizona v. California, 376 U.S. 546 (1963); United States v. Powers, 305 U.S. 527 (1939); Winters v. United States, 207 U.S. 564 (1908); United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957), on remand, 330 F.2d 897, rehearing denied, 381 U.S. 924 (1965); United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939); United States v. McIntire, 101 F.2d 650 (9th Cir. 1939); United States v. Powers, 94 F.2d 783 (9th Cir. 1938); Hibner v. United States, 27 F.2d 909 (E.D. Idaho, 1928); Skeem v. United States, 273 F. 93 (9th Cir. 1921); Conrad Inv. Co. v. United States, 161 F. 829 (9th Cir. 1908); Winters V. United States, 143 F. 740 (9th Cir. 1906); United States v. Powers, 16 F.Supp. 155 (D. Mont. 1936).

27. Gibson v. Anderson, 131 F. 39 (9th Cir. 1904). See also McFadden v. Mountain View Mining & Milling Co., 97 F. 670, 673 (9th Cir. 1899) (Colville Indian Reservation); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (review of the constitutional concepts involved in congressional recognition of Executive Order reservation).

28. 131 F. 39 (9th Cir. 1904).

29. 131 F. at 42.

30. United States v. Walker River Irr. Dist., 104 F.2d 334, 336 (9th Cir. 1939).

31. See United States v. Winters, 207 U.S. at 576, 577.

32. [?] J. Kent, Commentaries on American Law, 618, 400 (14th ed. 1896).

33. Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified in scattered sections of 43 U.S.C. ca. 12 [1970]).

34. See Federal Protection of Indian Resources: Hearings on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, Part 1, 92nd Cong., 1st Sess., 175 app. (1971) (Veeder, Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development). See also id. at 217, 220 app. (message from the President), 228-32 app. (testimony of government witnesses), 233-34 A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources) (all demonstrating the conflicts of interest within the Interior and Justice Departments giving rise to violation of Indian rights).

35. 236 F.2d at 329-42.

36. Id.

37. Id. at 333.

38. Id. at 332.

39. Hurley v. Abbott, No. 4564 (3rd D. Ariz. Territory, March 4, 1910) (commonly known as Kent Decree); see Hurley v. Abbott, 259 F.Supp. 669 (D. Ariz. 1966).

40. Id.

41. The Central Arizona Indian Tribal Water Rights Settlement Act of 1977, S. 905, 95th Cong., 1st Sess. (1972).

42. 236 F.2d at 338.

43. Id.

44. Jimmy Carter on American Indians, release undated.

45. National Water Commission, Water Policies for the Future (1973).

46. 2 National Water Commission, Proposed Report of the National Water Commission (Review Draft Nov. 1972).

47. Id. at 13-1.

48. Id.

49. Id.

50. Id. at 13-3.

51. 283 U.S. 423 (1931).

52. Id.

53. 357 U.S. 275 (1958).

54. 2 National Water Commission, supra note 46, at 13-3.

55. Id.

56. Id.

57. Id.

58. 349 U.S 435 (1955).

59. Id. at 437.

60. 2 National Water Commission, supra note 46, at 13-3.

61. U.S. Const., art. VI.

62. 2 National Water Commission, supra note 46, at 13-26.

63. Id.

64. Id.

65. Id.

66. Id.

67. See Letter dated March 19, 1973, to the Chairman, Subcomm. on Indian Water Rights, Federal Bar Association.

68. See National Water Commission, supra note 45, ch. 13 "Federal-State Jurisdiction In The Law Of Waters," at 459; ch. 14 "Indian Water Rights," at 473.

69. National Water Commission, supra note 45 at 473.

70. See discussion of both treaty and executive order reservations, supra note 27 and accompanying test. Part of the problem with the final report of the now defunct National Water Commission and with the Water Resources Council has been the refusal of their legal advisors to recognize the source and genesis of all titles to the rights to the use of water in western United States. As the Supreme Court has repeatedly held, the United States of America succeeded to the title to those areas west of the hundredth meridian from several foreign powers. As the owner of those lands, including but not limited to the water rights. Moreover, the power and authority of the National Government over those lands and rights to the use of water were plenary in character, as was recognized by the Supreme Court in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). The Court noted that, as the owner of the land and all of the water rights, the

National Government could dispose of the lands together with the rights to the use of water, or dispose of them separately. Moreover, the National Government could provide that while it remained the grantor of water rights, the method of acquiring those rights could be conditioned upon the laws of the several states, which the National Government did when it adopted the Desert Land Act of 1877, 43 U.S.C. 321 (1970). See also Howell v. Johnson, 89 F. 556 (C.C.D. Mont. 1898) (rights to the use of water may be sold or granted by the government separate from the rest of the estate). It has been recognized that as owners of their lands and rights, the Indians held all of their properties subject to the powers of the National Government. However, within the purview of those enforced limitations, the Indians had title to all of their lands and rights to water. See Winters v. United States, 207 U.S. 564, 576 (1908). Reviewing somewhat further back in history, it must also be recognized that the European empires of Great Britian, France, Spain and others denied that title could reside in the Indians after what is sometimes referred to as "discovery." After the Revolutionary War, the United States adopted the European concept relative to the title of the Indian people. See Johnson v. McIntosh, 21 U.S. (Wheat.) 543(1823). However, the United States of America did recognize, as demonstrated by Winters, that the Indians could and did reserve their rights to the use of water by treaties and agreements. See United States v. Winans, 198 U.S. 371 (1905). Moreover, when the reservations were created by Congress or the Executive Branch of the Government with Congressional recognition of title, the courts have regularly held that the title residing in the Indian people was sacred and protected under the due process clause of the Constitution. See Shoshone Tribe v. United States, 299 U.S. 476, 497 (1936).

71. Water Resources Policy Study, Study Plan and Timetable, 42 Fed. Reg. 34, 563 (1977).

72. Id. at 34, 564. See also 42 U.S.C. 1962 to 1962d-14 (Supp. 1974).

73. 42 Fed. Reg. at 34, 564. The following points were announced: (1) revision of WRC principles and standards; (2) deauthorization of old projects; (3) increased cost sharing by non-Federal entities; (4) reforms of laws, regulations and practices governing allocation of water; (5) wise use of water; (6) quantification of Indian water rights and Federal reserved water rights; (7) evaluation of water quality with conventional water resource allocation and development; (8) improved dam safety; and (9) increased water conservation.

74. Id.

75. 42 Fed. Reg. at 34, 563. "[A] Policy Committee [is] composed of the Assistant Secretary of the Interior--Land and Water Resources, Associate Director of OMB for Natural Resources, Energy and Science, and Member, Council on Environmental Quality."

76. See Hearings on Fed. Protection of Indian Resources, supra note 34, at 175 app., 191-92 (Veeder, Federal Encroachment of Indian Water Rights and the Impairment of Reservation Development).

77. Id.

78. 42 Fed. Reg. at 34, 563. The task force was composed of and its mission was described as follows:

> "4. Indian Water Rights and Federal Reserved Water Rights. Chaired by the Policy Committee. Team Leader: Bill Eikenberry, Interior. Involved Agencies: Justice, OMB, Army, and Agriculture.
>
> Numerous difficulties have arisen because of the present uncertainty over the amount of water to which Indian tribes and their members and, to a lesser degree, other Federal reservations, are entitled under the reserved rights doctrine. This task force will examine the situation and seek to recommend a Federal policy which addresses these problems and which reflects the Department of Interior's legal responsibility to protect the rights of Indians."

79. Id.

80. Draft, "A Bill - To establish and provide for the development of the reserved water rights appurtenant to Federal and trust reservations and the public domain, and for other purposes."

81. Memorandum, from Bill Eikenberry to Guy Martin (June 22, 1977) (Quantification of Federal Reserved and Indian Water Rights).

82. The significance of the Water Resources Council's position in regard to Indian water rights and probably the genesis of it may be found in National Water Commission, supra note 45 ch. 14. That phase of the National Water Resources Commission's report is gravely in error in many aspects of its commentary on the Indian Winters rights. It developed a rationale that in some manner the Indian Winters rights grew up without the knowledge of the other western areas. That, of course, is without foundation. The issue of the Indian Winters rights was constantly before the courts and has been repeatedly reviewed down through the years by students in Indian water rights. Indeed, there has never been a time over many years that the Indian Winters rights were not before the courts. It is evident that from 1908 forward, there were on-going cases. Id. at 474. Thus, the statement that "[f]ollowing Winters, more than 50 years elapsed before the Supreme Court again discussed significant aspects of Indian water rights" is incorrect. Id. at 474. See United States v. Powers, 305 U.S. 527 (1939). The comments do not support the conclusions expressed. It is strange that the Supreme Court would be required to review the matter more than once in light of the explicit nature of Winters, and the repeated review of the Winters Doctrine in the federal courts of appeals.

83. Memorandum, June 22, 1977.

84. Id.

85. Id.

86. Arizona v. California, 373 U.S. 546, 601 (1963).

87. Memorandum, June 22, 1977, Proposed Bill, sec. 2.

88. See "Proposed Statement for Federal Register, submitted to Policy Committee; prepared by Water Resources Policy Task Force on Indian Water Rights and Federally Reserved Water Rights, June 29, 1977," p.1:

"WATER RESOURCE POLICY STUDY TASK FORCE ON INDIAN WATER RIGHTS AND FEDERALLY RESERVED WATER RIGHTS Statement of the Problem: A Judicially created doctrine established by the Supreme Court decisions of Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546 (1963); and Cappaert v. United States, 426 U.S. 128 (1976) generally recognizes that when the United States establishes an Indian reservation, or any other Federal reservation such as a national park, forest, wildlife refuge, or military installation, the Federal Government reserves to itself, as of the date of the reservaton's establishment, a sufficient quantity of unappropriated water to accomplish the purpose for which the land was reserved."

89. Colville Indian Reservation, Nespelem, Washington.

90. No. 3421 (E.D. Wash.).

91. United States v. Walton, No. 3831 (E.D. Wash.).

92. Id.

93. Id.

94. Letter from Kent Frizzel (Ass't. Att'y. Gen. for Land & Water Resources) to United States Attorney, Spokane, Washington (March 6, 1973): "RE: United States v. William Boyd Walton, et ux. and the State of Washington; proposed action for protection of Colville Confederated Tribes' water rights. ***

There are enclosed an original and five copies of a complaint which seeks to have enjoined the unauthorized diversion and use of water from an unnamed stream on formerly allotted lands within the exterior boundaries of the Colville Indian Reservation and to have a judicial determination of the validity of a permit issued by the State of Washington to non-Indians for the aforementioned use and diversion of water. It is the position of the United States that the Secretary of the Interior has the exclusive jurisdiction to control and administer the allocation of water on tribal, allotted and formerly alloted lands of the Colville Reservation pursuant to

the authority vested in the Secretary under 25 U.S.C. Sec. 381. This allegation is the same as that made in the case entitled United States v. Bel Bay Community, et al., Civ. No. 303-71-C2, U.S.D.C. Western District of Washington.

As you are aware, now pending in the United States District Court for the Eastern District of Washington is a case entitled Colville Confederated Tribes v. William Boyd Walton, et ux., Civ. No. 3421, which addresses the same situation as the proposed suit.

By letter dated February 2, 1973, the Department of the Interior requested that we intervene in the aforementioned suit and make the allegations which are now contained in the proposed action. A copy of that letter is enclosed. We have decided, however, not to intervene because the complaint filed on behalf of the Tribes does not, in our opinion raised [sic] the issue which must be addressed to obtain a judicial determination in this controversy i.e., the authority of the Secretary of the Interior to determine the allocation of water on Indian lands. (emphasis added)

95. Id.

96. Id.

97. Id.

98. "EXEMPTION OF INDIAN RIGHTS TO THE USE OF WATER FROM THE FEDERAL RESERVE RIGHTS POLICY:

"The Secretary of the Interior is fully aware of the unique status of the Indians as beneficiaries of the trust responsibility owing to them by the United States. Moreover, the Indians are the owners of the full equitable title to the rights to the use of either surface water and groundwater on their reservations. The sole interest of the United States is the holder of the legal title to those rights for the benefit of the Indians.

"The Secretary, as principal agent of the trustee United States, is obligated to protect and preserve those Indian rights to the use of water. The Secretary further recognizes that the [sic] Indian rights are not 'Federal rights'; and therefore, cannot be included in any policy statement involving 'Federal rights.'

"There is now being formulated a separate independant policy pertaining to Indian rights to the use of water under the direction of Forrest J. Gerard, designee for the Office of Assistant Secretary of the Interior for Indian Affairs. Thus, the Indian rights are in no way involved in this publication in the Federal Register and any hearings in connection with it."

See, e.g., Memorandum from Rogers C.B. Morton (Sec. of the Interior) to the Assistant Secretary, Energy and Resources, Assistant Secretary, Fish, Wildlife and Parks Commission, Bureau of Indian Affairs, transmitting the "Solicitor's Opinion on the

Boundaries and Status of Title to Certain Lands within the Colville and Spokane Indian Reservations." The Solicitor's Opinion, at 9, states that "Congress has recognized the Colville Confederated Tribes' full equitable title to tribal lands within the Colville Reservation, both in the 1940 Act and in prior legislation. See United States v. Pelican, 232 U.S. 442, 445, (1914)..."

99. Water Resource Policy Study, 42 Fed. Reg. 37,940, 37,957 (1977).

"A judicially created doctrine generally recognizes that when the United States established a Federal reservation such as a national park, forest, wildlife rufuge, or military installation at least as early as the date the reservation was established, a sufficient quantity of unappropriated water is reserved to accomplish the purposes for which the land was reserved."

100. Id.

101. See not 98, supra.

102. Id.

103. Solicitor's revision of statement of the Assistant Secretary for Indian Affairs, as set forth in note 98 supra. (emphasis added)

104. Id.

105. A right to the use of water is an interest in real property. See notes 2 and 3, supra. and note 115 infra. Apparently, the Solicitor means "a beneficial right to the use of water" is something other than the title which the courts have recognized resides in the Indian people.

106. Indian Water Rights Statement, 42 Fed. Reg. 38, 463 (1977).

"The Secretary of the Interior is fully aware of the unique statues [sic] of the Indians as beneficiaries of the trust responsibility owing to them by the United States. Indians are the owners of a beneficial right to the use of either surface water or ground water related to their reservations. The trustee United States is obligated to protect Indian rights to the use of water.

"A study of policy regarding Indian water rights will be undertaken initially by the new Assistant Secretary of the Interior for Indian Affairs. This study will be coordinated as a part of the overall study of water policy reform.

"Indian water rights are not the same as "Federal rights' and, therefore, can not be included in a policy statement involving 'Federal rights' (see issues of July 6, 15 and 25 (42 FR 34563, 36788 and 37940, respectively) and no separate opinion paper on Indian rights to the use of water will be published."

The statement was signed by Guy Martin, Alternate to the Chairman of the Water Resources Council.

107. Id. (emphasis added)

108. Id.

109. See note 44, supra.

110. See note 44, supra., and United States v. Ahtanum Irr. Dist., 236 F.2d 321, 338 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957), on remand, 330 F.2d 897, rehearing denied, 338 F.2d 307 (1964), cert. denied, 381 U.S. 924 (1964).

111. See United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

112. The Attorneys General present at the Conference of Western Attorneys General included Avrum Gross (Alaska), Lyle L. Richmond (American Samoa), Bruce Babbitt (Arizona), Evelle J. Younger (California), John D. MacFarlane (Colorado), Don Parkinson (acting) (Guam), Ronald Y. Amemiya (Hawaii), Wayne Kidwell (Idaho), Michael T. Greely (Montana), Robert List (Nevada), Toney Anaya (New Mexico), Allen I. Olson (North Dakota), James A. Redden (Oregon), Robert B. Hanson (Utah), Slade Gorton (Washington), V. Frank Mendicino (Wyoming).

113. United States v. Big Horn Line Canal, No. 75-34 (D. Mont., filed April 17, 1975); Northern Cheyenne Tribe v. Tongue River Water Users Ass'n., No. 75-20 (D. Mont., filed March 7, 1975).

114. Id.

115. Veeder, Water Rights in the Coal Fields of the Yellowstone River Basin, 40 Law and Contemp. Prob., 77, 91 (1976).

116. District Court of Washakie County, State of Wyoming.

117. Id.

118. See Hearings on Federal Protection of Indian Resources, supra note 34, at 175 app. (Veeder, Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development). See also id. at 217 app. (Kennedy Address to National Congress of American Indians), 228 app. (testimony of government witnesses).

119. The Sale of Water from the Upper Missouri River Basin by the Federal Government for the Development of Energy: Hearing Before the Subcomm. on Energy Research and Water Resources of the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., 115, 165 (1975).

120. Id.

121. Hearings on Federal Protection of Indian Resources, supra note 34, at 175 app., 192 (Veeder, Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development).

122. Id.

123. Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955); First Iow Hydro-electric Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946).

124. Id.

125. 382 U.S. 152 (1946).

126. 349 U.S. 435 (1955).

127. Id. at 445.

128. McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 424 (1819).

129. Winters v. United States, 143 F. 740, 749 (9th Cir. 1906).

130. 174 U.S. 690 (1899).

131. Id. at 703.

132. U.S. Const., art. I, § 8(3): "The Congress shall have Power...To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." See United States v. Kagama, 118 U.S. 375, 382 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 1832); Cherokee Nation v. Georgia 30 U.S. (5 Pet.) 1, 17 (1831).

133. Hunt v. United States, 278 U.S. 96, 100 (1928).

134. Camfield v. United States, 167 U.S 518, 526 (1897).

135. Annot. 79 L. Ed. 477 (1935).

136. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1920).

137. Act of February 22, 1889, ch. 180, § 1, 25 Stat. 676 (1889).

138. Id., § 4 (2).

139. Id.

140. United States v. McIntire, 101 F.2d 650, 653, 654 (9th Cir. 1939).

141. United States v. Ahtanum Irr. Dist., 236 F.2d 321, 328 (9th Cir. 1956), cert. denied, 252 U.S. 988 (1957), on remand, 330 F.2d 897, rehearing denied, 338 F.2d 307 (1964), cert denied, 381 U.S. 924 (1965).

142. Id.

143. Id. at 340.

144. Washington State pleaded: "Through the creation of the Colville Reservation, rights to the use of water thereon by Indians were impliedly reserved with the date of the establishment of the Reservation as the priority date. However, these rights were and are limited to the use of amounts reasonably needed to satisfy the purposes for which the Colville Reservation was created. The use of available water not needed, at any point in time, to satisfy these purposes, for the present and reasonably foreseeable future, is within the authority of defendant-intervenor to regulate and control. Any use authorized by defendant-intervenor under such circumstances is made within the context of a system of priority and would yield to any subsequent conflicting Indian water usage within the scope of prior rights impliedly reserved to Indians." See Answer of Intervenor State of Washington, filed October 19, 1972, in Colville Confederated Tribes v. Walton, No. 3421 (E.D. Wash.), pg. 2, para. 2.

145. United States v. Anderson, No. 3643 (E.D. Wash.)

146. Act of February 22, 1889, ch. 180 § 1, 25 Stat. 676; Wash. Cons., art. XXVI, § 2. Western states generally have waivers of jurisdiction over Indians and their properties. Yet, consistent vigilance on the part of the Indian is required due to the aggressiveness of the states and their citizenry with respect to Indian reservations.

147. "The entire watershed to its uttermost confines, covering thousands of square miles, out to the crest of the divides which separate it from adjacent watersheds, is the generating source from which the water of a river comes or accumulates in its channel....Any appropriator of water from the central channel is entitled to rely and depend upon all the sources which feed the main stream above his own diversion point, clear back to the farthest limits of the watershed." Richland Irr. Co. v. Westview Irr. Co., 96 Utah 403, 418, 80 P.2d 458, 465 (1938).

148. "The law in Colorado governing the first classification above suggested, i.e., underground waters which, if not intercepted, will utlimately find their way to a natural stream, is well settled. It has been frequently held by our appellate courts, from a very early date down to the present time, that all underground waters which by flowage, seepage or percolation will eventually, if not intercepted, reach and become a part of some natural stream either on or beneath the surface, are governed and controlled by the terms of the constitution and statutes relative to appropriation, the same as the surface waters of such stream." Templeton v. Pecos Valley Artesian Conservancy Dist., 65 N.M. 59, 332 P.2d 465, 470, (1958). See also City of Colorado Springs v. Bender, 148 Colo. 458, 462, 366 P.2d 552, 555 (1961); Safranek v. Town of Limon, 123 Colo. 330, 334-35, 228 P.2d 975, 977 (1951).

149. The suggestion that much of the water of the Ahtanum Creek originates off the reservation is likewise of no significance: "[I]t would be a novel rule of water law to limit either the riparian proprietor or the appropriator to waters which originated upon his lands or within the area of appropriation. Most streams in this portion of the country originate in the mountains and far from the lands to which their waters ultimately become appurtenant." United States v. Ahtanum Irr. Dis., 236 F.2d 321, 325 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957), on remand, 330 F.2d 897, rehearing denied, 338 F.2d 307 (1964), cert denied, 381 U.S. 924 (1965).

150. United States v. Dist. Court for Eagle County, 401 U.S. 520 (1971).

151. 424 U.S. 800 (1976).

152. See §§ I-C supra.

153. See Arizona v. California, 373 U.S. 546, 598 (1963). It is assumed for this review that the Indian titles were extinquished antecedent to the revestiture of the rights.

154. See § I-D supra.

155. 1 Wiel, Water Rights in the Western States, § 66 at pg. 66-67 (3d ed. 1911).

156. Act of Aug. 14, 1848, ch. 177, 9 Stat. 323 (confirming the treaty arrangements entered into June 15, 1846).

157. Act of Feb. 2, 1848, 9 Stat. 922.

158. 332 U.S. 19 (1947). See also Jennison v. Kirk, 98 U.S. 453 (1878); California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935); Hough v. Porter, 51 Or. 318, 95 p. 732 (1908), supplemental opinion, 51 Or. 318, rehearing denied, 51 Or. 318, 102 p. 728 (1909).

159. 98 U.S. 453, 457-58 (1878).

160. Act of July 26, 1866, ch. 262, 14 Stat. 251 (codified at 43 U.S.C. 661 [1970]). See also Act of July 8, 1870, ch. 235, 16 Stat. 218 (codified at 43 U.S.C. 661 [1970]).

161. Jennison v. Kirk, 98 U.S. 453, 461 (1878).

162. Desert Land Act of 1877, ch. 107, 19 Stat. 377 (amended version at 43 U.S.C. § 321 [1970]).

163. United States v. O'Donnell, 303 U.S. 501, 510 (1938).

164. Id.

165. 295 U.S. 142 (1935).

166. Id. at 162.

167. Id.

168. Id.

169. 89 F. 556 (C.C.D. Mont. 1898).

170. Id. at 558.

171. 51 Or. 318, 95 P. 732 (1908), supplemental opinion, 51 Or. 318, 98 P. 1083, rehearing denied, 51 Or. 318, 102 P. 728 (1909).

172. 295 U.S. at 160-61.

173. U.S. Const., art. IV, § 3(2).

174. Federal Power Comm'n. v. Oregon, 349 U.S. 435 (1955).

175. See Arizona v. California, 373 U.S. 546, 597-98 (1963). "Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved lands rests largely upon statement in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), and Shively v. Bowlby, 152 U.S 1 (1894)...But those cases involved only the shores of and lands beneath navigable waters under the Commerce Clause and to regulate government lands under Art. IV § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property."

176. The nature of proceedings, comparable to those in Arizona v. California, have been characterized as follows: "This is a suit brought by the United States as trustee for the Yakima tribe of Indians to establish and quiet title to the Indians' right to the use of the waters..." United States v. Ahtanum Irr. Dist., 235 F.2d 321, 323 (9th Cir 1956), cert. denied, 352 U.S. 988 (1957), on remand, 330 F.2d 897. rehearing denied, 338 F.2d 307 (1964), cert. denied, 381 U.S. 924 (1965). After reviewing the issues which had been joined in those proceedings, the Court of Appeals stated: "The suit, like other proceedings designed to procure an adjudication of water rights, was in its purpose and effect one to quiet title to reality." Id. at 339.

Continuing, the Court concluded: "Furthermore, as in the case of other suits to quiet title, the defendants should have been required to appear by answer and set forth their claims of right to the use of the water of the stream." Id. at 339.

Simply stated, a decree quieting title to water rights in a general adjudication does not and, of course, could not create rights. All that it does is chronicle, in the form of a decree, the existing rights to the water and their priorities. 2 Wiel, supra, note 155, at 1126.

The Supreme Court of Colorado has declared: "the Statutory decree confers no new rights, but, as this court has repeatedly held, embodies in the form of a permanent, binding decree the evidence of pre-existing rights." Alamosa Creek Canal Co. v Nelson, 42 Colo. 140, 147, 93 P. 1112, 1114 (1908).

177. National Water Commission, supra note 45 at 460.

178. Id. at n.5.

179. Id. at 474.

180. Id. (quoting 207 U.S. at 576).

181. National Water Commission, supra note 45, at 474, also quoted the following language from Winters: "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be... That the Government did reserve them we have decided, and for a use which would be necessarily continued through the years." 207 U.S. at 577. (emphasis added).

The Supreme Court used the term "reserved," not "created," as the National Water Commission would have us believe, in Winters. "Reserved" means to "retain" something which must be in existence. See H. Black, Black's Law Dictionary, 1473 (rev. 4th ed. 1968).

182. National Water Commission, supra note 45 at 473-74 (quoting 207 U.S. at 577).

183. 207 U.S. at 577 (emphasis added).

184. National Water Commission, supra note 45, at 474 (emphasis added) (immediately following the declaration by the Supreme Court that the existing Indian rights were "reserved," not "created").

185. 207 U.S. at 576 (emphasis added).

186. 42 Fed. Reg. 37,940, 37,957 (1977) (emphasis added).

187. 207 U.S. 546 (1908).

188. 373 U.S. 546 (1963).

189. 426 U.S. 128 (1976). See note 88 supra, and accompanying text (commentary on the change).

190. The theories advanced by the National Water Commission and the Water Resources Council against federal rights for national forests, national parks and other federal enclaves are totally without merit. The federal rights are not and could not be judicially created by the decision of the Supreme Court in Arizona v. California, 373 U.S. 546 (1963). Another error frequently

repeated is that the Bureau of Reclamation has obtained its water rights from the states. That error is predicated upon the language of section 8 of the Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388 (1902)(codified at scattered sections of 43 U.S.C. ch. 12 (1970): "Nothing in sections...of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." 43 U.S.C. § 381 (1970).

Comment has previously been directed to the inceptive errors of the National Water Commission. The statement that "water rights" for Bureau of Reclamation projects "were obtained in compliance with state law, "National Water Commission, Final Report, supra note 45, at 459-71. Nevertheless, that mistaken concept is being repeated by state and some federal officials. The important element is that the states do not have the power in any way to interfere with the performance by the United States in the construction, operation, maintenance or control of reclamation projects. See United States v. Hansen, 167 F. 881 (9th Cir. 1909); Burley v. United States, 179 F. 1 (9th Cir. 1910); Brown v. United States, 263 U.S. 78 (1923); Swigart v. Baker, 229 U.S. 187 (1913); United States v. Gerlach Live Stock Co. 339 U.S. 725 (1950). In Gerlach, the United States, without complying with state law, developed the Central Valley Reclamation Project on the San Juaquin and Sacramento Rivers and there developed waters in those streams. However, where the National Government invaded state rights, payment was made to the riparian owners who suffered partial taking of their riparian rights in the streams in question. It is, of course, clear beyond question that the United States must pay for vested rights.

In City of Fresno v. California, 372 U.S. 627 (1963), the Supreme Court declared that the section 8 of the Reclamation Act does not require compliance with state law by the Bureau of Reclamation. Rather, the effect of section 8 is to leave to state law the definition of property interest, if any, for which compensation must be paid. See also Dugan v. Rank, 372 U.S. 609 (1963); Arizona v. California, 373 U.S. 546 (1963).

In Arizona v. California, 283 U.S. 423, 451-52 (1931), the Supreme Court declared that the Bureau of Reclamation need not comply with the state laws of Arizona, either in regard to acquisition of rights to the use of water or in the construction of Boulder Dam. In fact, it noted that the Secretary of the Interior, pursuant to authority, was proceeding in disregard of those laws and upheld his actions.

191. 42 Fed. Reg. 38,463 (1977). See note 106 supra, and commentary.

192. 401 U.S. 520 (1971).

193. 424 U.S. 800 (1976).

194. Id.

195. Id.

196. 43 U.S.C. 666 (1970). The codification of the McCarran Act does not reflect the fact that it was a rider to the Department of Justice Appropriation Act of July 10, 1952, Pub. L. No. 495, 66 Stat. 437, § 208. Subsection (d), which was not printed as part of the Act, precluded the use of any appropriation to the Justice Department for the purpose of preparing or prosecuting the case of United States v. Fallbrook Pub. Utility Dist. See United States v. Fallbrook Pub. Utility Dist., 165 F.Supp. 806 (S.D. Cal. 1958) (history of the litigation).

197. United States v. Fallbrook Pub. Utility Dist., 108 F.Supp 72 (S.D. Cal. 1952).

198. See Final Judgment and Decree, United States v. Fallbrook Pub. Utility Dis., No. 1247-D-C (S.D. Cal. May 8, 1963). The Marine Corps rights in the Santa Margarita River were primarily riparian rights acquired from the Rancho Santa Margarita, which derived its title from an early Spanish grant to the one-time governor of California, Pio Pico.

In one of the decisions, United States v. Fallbrook Publ. Utility Dist., 108 F.Supp. 72, 81 (S.D. Cal. 1952), the use of water for domestic purposes by 50,000 Marines in the Camp Pendleton Military Camp was held to be a proper, reasonable riparian use. Subsequently, the court measured those riparian rights to the use of water for military purposes as being the amount of water allowable for agricultural use of the ranch, which had been purchased for Camp Pendleton. The measure of those rights was very extensive and sufficient for the military personnel that the camp was built to sustain.

199. See Decree, United States v. Fallbrook Pub. Utility Dist., (S.D. Cal. Nov. 8, 1962).

200. 373 U.S. 546 (1963).

201. Hearings on Federal Protection of Indian Resources, supra note 34, at 212 app. (Veeder, Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development), 92nd Cong., 1st Sess., U.S. Sen., Part 1, October 19 and 20, 1971, p. 212.

202. Indian Trust Council, Hearings on S. 2035 before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92nd Cong., 1st Sess., 98 (1971).

203. 347 F.2d 48.

204. Id. at 54.

205. Id.

206. Id.

207. Although 13 years have elapsed since the publication of the decree in Arizona v. California, 376 U.S. 340 (1964), it still has not been finally entered by that Court because of the efforts further to prejudice the interests of the Indian people.

208. See Momorandum dated Aug. 13, 1975, entitled, "Proposed 'Stipulation of Present Perfected Rights,' Violate Decree in Arizona v. California," with supporting affidavits reviewing in great detail the failure of the Justice Department to properly present the Indian claims due to the fact that simultaneously the Justice Department was either presenting the adverse claims of the Bureau of Reclamation or was assisting the State of California in the presentation of the claims of the Imperial Irrigation District and the Palo Verde Irrigation District. These two powerful, political entities are claiming large quantities of water with priorities directly in conflict with the Indian tribes on the lower river of the Colorado.

210. See Dugan v. Rank, 372 U.S. 609 (1963); Miller v. Jennings, 243 F.2d 157, 159 (9th Cir. 1957).

211. See memorandum of the Decision, Dec. 7, 1965, C-7-56, in the United States Court for the District of Utah, remanding to the third Judicial Court for the State of Utah in and for the County of Daggit, the rights to the use of water of the United States in a tributary of the Green River in Utah.

212. See note 202 supra.

213. 401 U.S. 520 (1971).

214. 43 U.S.C. § (1970).

215. Motion for leave to file suggestion of interest by Fort Mojave Tribe, at 15-17 app., United States Dist. Court for Eagle County, 401 U.S. 520 (1971).

216. Id.

217. United States v. Dist. Court for Eagle County, 169 Colo. 555, 458 p.2d 760 (1969).

218. Motion of the Fort Mojave Tribe to Supreme Court, at 75 app. [wire from Agua Calientes Band of Mission Indians to Erwin N. Griswold, Solicitor General of the United States (October 21, 1970)]. Similar wires were sent by the Mojave Tribe to the Solicitor General. Letters followed from those tribes to the Attorney General.

219. Id. at 80-81 app.

220. 401 U.S. 520 (1971).

221. Id. at 522-23.

222. 424 U.S. 800 (1976).

223. "As a result, I think we must look at this from the point of view of the fact that Indian water rights from this point are in the majority of instances going to be adjudicated in state courts as long as the McCarran Amendment is in effect and applicable to the adjudication of Indian rights.

"I say this is unfortunate and I believe it is borne out in both a history of what the courts have found over 100 years and by the fact [sic] as we know them today. I think there has been a historic conflict between the tribes and the states and with the United States effectively balancing up the balance of power by coming down in its trust responsibility on the sides of the tribes.

"Supreme Court cases as much as over 100 years ago have noted the fact that there has been a historic hostility between the states and the tribes and that indeed it is the federal interest that has protected the tribes wherever they may be.

"Inevitably, this runs over into the courts. I think we have a situation which is developing similarly day by day now in the State of Washington where in effect the state courts and the state administration both have totally abandoned the protection of Indian treaty rights in fishing and have thrown the total burden of enforcement of fishing rights not only for Indians but in effect for commercial and sports fishermen as well into the federal court.

"They have thrown up their hands. They have abandoned any semblance of recognition of obligations to the tribes in that instance. I think it is fair to say that very much the same thing will come up wherever water rights or Indian rights as a whole come head to head with strong commercial interests within a state." Oversight Hearings on Indian Water Rights, Judiciary Comm. of the U.S. Sen., Subcomm. on Administrative Practice and Procedure, June 22, 1976 (statement by Peter Taft, Assistant Attorney General).

224. 167 U.S. at 526. See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Hunt v. United States, 278 U.S. 96 (1928); Kickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920)(cases declaring that Congress cannot delegate its power and authority to the states). Here Congress has, in effect, subjected the Indian to state control over their vast and valuable water rights in clear conflict with the Constitution of the United States, art I, § 8(3), in which the trust obligation of the United States is established. Moreover, there is a clear violation by Congress in seeking to abdicate its responsibility to the properties of the Indian people. See U.S. Const., art IV § 3(2).

225. See 1 Wiel, supra note 155, at 678-32; 2 Wiel, supra note 155 at 1095-1141; Waters and Water Rights, § 23 (R. Clark ed. 1967).

226. Id.

227. Wrathall v. Jackson, 86 Utah 50, 40 P.2d 755, 777 (1935)(emphasis added). Accord, Vineyard Land & Stock Co. v. Dist. Court, 42 Nevada 1, 171 P. 166, 173, 174 (1918); Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 448, 449 (1916); Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 P. 258, 260 (1900); Enterprise Irr. Kist. v. Tri-State Land Co., 92 Neb. 121, 138 N.W. 171, 179 (1912); In re Willow Creek, 74 Or. 592, 144 P. 505, 513, 514 (1914); Farmers Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 P. 444, 449 (1896); Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 134, 21P. 1028, 1031 (1889); California Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555, 562, 567 (9th Cir. 1934), aff'd, 295 U.S. 142 (1934)(the Supreme Court did not find it necessary to pass on the power of the legislature to modify allegedly vested riparian rights but affirmed on other grounds). 3 Kinney, Irrigation and Water Rights § 1341 (2d ed. 1912). 2 Wiel, supra note 155 § 1184.

In Colorado, it has been suggested that the constitutional provisions of that state, in some manner, seized the title to the unappropriated rights to the use of water of the United States within that state. That seizure, of course, is an impossibility.

The late L. Ward Bannister, an outstanding lawyer, in the area of Colorado water, rejected the fallacy that Colorado could own the waters of the stream within the state: "If this be the only theory of supporting a power in the state to dispose of the waters, only some of the states would have the power, for only some have constitutional character."

Bannister, "The Question of Federal Disposition of State Waters in the Priority States," 28 Harv. L. Rev. 270, 283 (1915). Citing Colo. Const., art. XVI § 5, Mr. Bannister continued:

"Some of the Colorado doctrine commonwealths, bent on putting the water as far as possible beyond the control of the federal government, have adopted constitutional provisions declaring the waters to be the 'property of the public' or the 'property of the state.' Even these provisions which are substantially the same in effect are not considered as vesting the state with any property rights in the waters or in their use by affirming sovereign jurisdiction over them."

228. 401 U.S. 520, 522 (1971).

229. 169 Colo. 555, 458 p.2d 760, 770 (1969)

230. U.S. Const., art. III § 2: "The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws

of the United States, and Treaties made, or which shall be made, under their Authority."

231. 293 F.2d 340, 360 (9th Cir. 1962), rev'd on other grounds, 372 U.S. 627, 629 (1963).

232. State ex. rel. Reynolds v. Aamodt. No. 6639-C.

233. Hearings on Federal Protection of Indian Resources, supra note 34, at 193 app., n. 84 (Veeder, Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development).

234. Id.

235. On Jan. 15, 1975, Secretary Morton, by a memorandum dated Jan. 15, 1975, made the following statement and directive to the Commissioner of Indian Affairs:

SUBJECT: Tribal Water Codes: "As you know, the Department is currently considering providing for the adoption of tribal codes to allocate the use of reserved waters on Indian reservations. Our authority to regulate the use of water on Indian reservations is presently in litigation. I am informed, however, that some tribes may be considering the enactment of water use codes on their own. This could lead to confusion and a series of separate legal challenges which might lead to undesirable results. These may be avoided if our regulations could first be adopted.

"I ask, therefore, that you instruct all agency superintendents and area directors to disapprove any tribal ordinance, resolution, code, or other enactment which purports to the use of water on Indian reservations and which by the terms of the tribal government document is subject to such approval or review in order to become or to remain effective, pending ultimate determination of this matter."

That memo from Secretary Morton contains the concepts which are so violative of Indian rights. The water codes are for the purpose of governing "reserved" water on Indian reservations. Until the distorted concepts of the Solicitor and Lands Divisions were comprehended, the meaning of C.B. Morton's memorandum of Jan. 15, 1975, was cryptic. It is no longer for it is evident that as directed by C.B. Morton, the "Proposed Rules," which were issued on March 17, 1977, achieve the desired end which he espoused.

236. 42 Fed. Reg., 14,886-87 (1977).

237. Id.

238. See memorandum, "An Analysis of Proposed Secretarial Rules Respecting 'The Use of Water on Indian Reservations' And the Recommended Rejection of Them," p.1.

239. Id. at attachments.

240. United States v. Bel Bay Community, No. 303-71-C-2 (W.D. Wash.).

241. Analysis of Bel Bay, p. 9, n. 6 of the "Analysis." In the analysis, it is revealed that the conflict between the Justice Department and the Lummi Tribe, on whose reservation the Bel Bay case has arisen, is very great. At no time has the tribe agreed to the course pursued by the Justice Department which is, in effect, diametrically opposed to the Lummi Tribe. The tribe declares that the Bel Bay Community has no right to use the waters of the Lummi Reservation to which the tribe is asserting title.